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IN THE

# Supreme Court of the United States

OCTOBER 1969 TERM

H. H. ROBERTSON CO., AND LIBERTY MUTUAL INSURANCE CO.
Appellants

vs.

KENNETH NEWBERRY GUARDIAN of LARRY NEWBERRY
Appellee

No. 418

## JURISDICTIONAL STATEMENT

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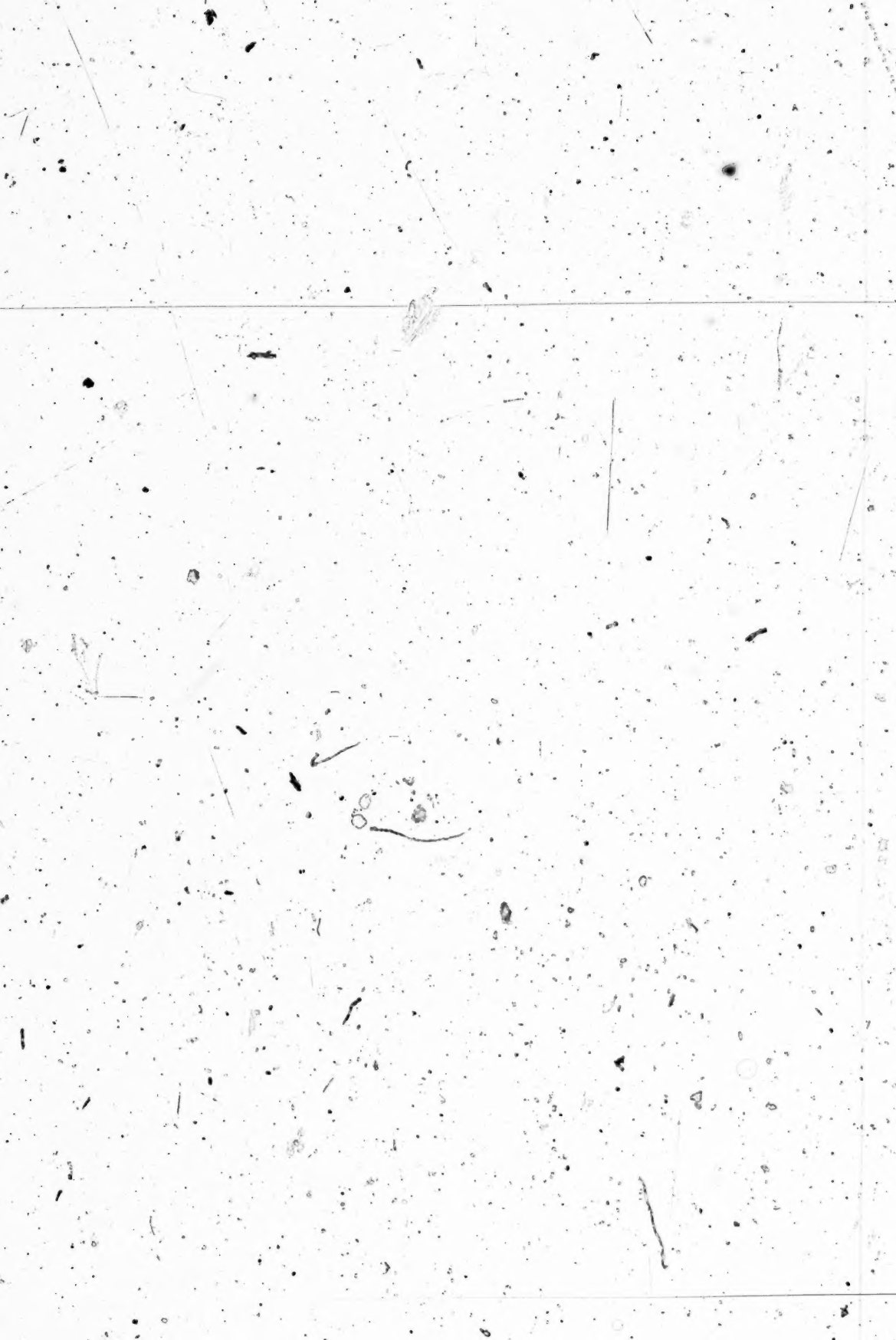

IN THE

# Supreme Court of the United States

OCTOBER 1969 TERM

H. H. ROBERTSON CO., and LIBERTY MUTUAL INSURANCE CO.
Appellants

vs.

KENNETH NEWBERRY GUARDIAN of LARRY NEWBERRY
Appellee

No. .....

## JURISDICTIONAL STATEMENT

This is an appeal from an Order of the Supreme Court of Michigan denying an Application for Leave to Appeal from an Opinion and Order of the Workmen's Compensation Appeal Board. For their jurisdictional statement, pursuant to Rule 15, the appellants respectfully show:

### THE OPINIONS BELOW

None of the opinions in this case given by the various agencies and Courts have been officially reported. The decision and Opinion of Hearing Referee James H. Coss of the Workmen's Compensation Department is included herein as Appendix A. The Opinion of the Workmen's Compensation Appeal Board is included herein as Appen-

dix B. The Order of the Court of Appeals of the State of Michigan denying Application for Leave to Appeal is included herein as Appendix C. The Order of the Supreme Court of the State of Michigan denying Application for Leave to Appeal is included herein as Appendix D.

The basis for the prior determinations of this case is an opinion of the Supreme Court of the State of Michigan, *Lahti* vs. *Easterling*, reported at 357 Mich. 578, and 99NW2d 490. The majority opinion is included herein as Appendix E. The dissenting opinion is included herein as Appendix F.

**GROUNDS ON WHICH JURISDICTION IS INVOLVED**

Larry Newberry, plaintiff's ward, was injured on January 23, 1951 while employed by H. H. Robertson Company. Robertson's obligation to provide workmen's compensation benefits as determined by the statutes then in effect, CL '48 § 411.1 et seq, was insured by Liberty Mutual Liability Company. The liability to Larry Newberry as invoked by statute in effect at the time of the injury, was paid in full by Liberty Mutual Insurance Company. At an administrative hearing called to determine if Larry Newberry was entitled to continued weekly benefits from a fund contributed to by all employers subject to the Michigan Workmen's Compensation Act, as a person meeting the statutory requirements of "permanent and total disability", the question was raised as to whether Larry Newberry was entitled to additional and continuing medical benefits furnished by his employer's insurer.

At the time of his injury Larry Newberry was entitled to four 6 month periods of medical benefits, Public Acts, 1949, No. 238, § 412.4. The provisions for medical benefits were, in 1955, enlarged by amendment, Public Acts 1955,

No. 250, §412.4, to provide for an unlimited number of six month periods of medical benefits.

Appellants resisted the claim for medical benefits beyond those provided by statute at the time of injury, by contending, *inter alia*, that to award medical benefits beyond what was provided by statute at the time of injury would be an impairment of contract contrary to Article 1 Section 10, of the Constitution of the United States and would deprive appellants of due process of law, contrary to Amendment XIV to the Constitution of the United States.

This position was rejected by the administrative agencies dealing with workmen's compensation benefits in Michigan; the final administrative rejection being issued by the Workmen's Compensation Appeal Board, October 1, 1969. Review of this decision was sought by Applications for Leave to Appeal with the Court of Appeals for the State of Michigan and the Supreme Court for the State of Michigan, filed October 30, 1969 and November 13, 1969, respectively. The Applications for Leave were denied on January 29, 1970 by the said Court of Appeals and on June 18, 1970 by said Supreme Court. The Michigan Supreme Court treated its decision as one denying leave from the denial of leave by the Court of Appeals.

Notice of appeal of the decision of June 18, 1970 of the Supreme Court of the State of Michigan was filed on July 9, 1970 in the Supreme Court of the State of Michigan, the Court of Appeals of the State of Michigan and the Michigan Workmen's Compensation Appeal Board. Certification of the record was requested of the Supreme Court of the State of Michigan, the Court of Appeals of the State of Michigan, and the Workmen's Compensation Appeal Board, each tribunal having a part of the record.

The Statutory provision conferring jurisdiction on this Court is 28 U. S. C. § 1257(2).

The following cases sustain this Court's jurisdiction:

*Metlakatla Indian Community, Annette Island Reserve* vs. *Egan*, 363 U.S. 555

*Automobile Workers* vs. *O'Brien*, 339 U.S. 454

*Largent* vs. *Texas*, 318 U.S. 418

*Chicago & E. I. R.* vs. *Industrial Commission of Illinois*, 284 U. S. 296

*Dalinke-Walker Milling Co.* vs. *Bondurant*, 257 U.S. 282

*William N. Bruffy*, 102 U.S. 248

There is a question of the validity of a state statute as the highest Court in the state has construed it. This statute is Public Act 1955, No. 250, § 412.4, which in pertinent part states:

> "The employer shall furnish, or cause to be furnished, to an employee who receive a personal injury arising out of and in the course of his employment, reasonable medical, surgical and hospital services and medicines or other attendance or treatment recognized by the laws of this state as legal, when they are needed, for the first 6 months after the injury and thereafter for such additional 6 month periods as the commission may in its discretion order, . . ."

In *Lakti* vs. *Fosterling*, supra, opinions included as Appendix E and Appendix F, the Michigan Supreme Court construed this statute to be intended to apply retrospectively. In this case appellants' challenge the application of the above statute on a retrospective basis as being repugnant to the Constitution of the United States. The administrative orders and the denial of judicial review were based upon the decision in *Lahti* vs. *Fosterling*, supra.

## QUESTIONS PRESENTED ON APPEAL

### FIRST

**WHERE A STATE WORKMEN'S COMPENSATION STATUTE, WHICH HAS BEEN DETERMINED TO BE A PART OF THE EMPLOYMENT CONTRACT, IS AMENDED TO ENLARGE MEDICAL BENEFITS FROM A TOTAL OF TWO YEARS OF BENEFITS TO A LIFETIME OF BENEFITS AND SUCH AMENDMENT IS DEEMED TO BE RETROSPECTIVE SO AS TO ENLARGE BENEFITS FOR INJURIES THAT HAVE ALREADY OCCURRED, IS SUCH AN AMENDMENT CONTRARY TO THE IMPAIRMENT OF CONTRACTS PROVISIONS OF ARTICLE 1, SECTION 10 OF THE CONSTITUTION OF THE UNITED STATES?**

### SECOND

**WHERE SUBSTATIVE CHANGES IN MEDICAL BENEFITS ARE CREATED BY AMENDMENT TO A STATE WORKMEN'S COMPENSATION STATUTE DOES GIVING RETROSPECTIVE APPLICATION TO SUCH AMENDMENT DEPRIVE THOSE RESPONSIBLE FOR WORKMEN'S COMPENSATION BENEFITS OF PROPERTY WITHOUT DUE PROCESS OF LAW CONTRARY TO AMENDMENT XIV TO THE CONSTITUTION OF THE UNITED STATES?**

## STATEMENT OF THE CASE

Larry Newberry was injured while employed by H. H. Robertson Company on January 23, 1951. There was no issue as to his entitlement to the benefits provided by the Workmen's Compensation Act of Michigan, as the statute was then in effect and he was voluntarily paid these benefits. During an administrative inquiry as to whether Larry Newberry was entitled to further weekly workmen's compensation benefits because he continued to be "permanently and totally disabled", such benefits being paid

from a fund contributed to by all employers subject to the Michigan Workmen's Compensation Act, Public Acts 1955, No. 250, § 412.8a, 412.9, MCLA § 412.8a, it was claimed on behalf of Larry Newberry that he was entitled to medical care benefits beyond what were in effect by statute at the time of his injury, four 6 month periods of medical care, Public Acts 1949, No. 238 § 412.4.

The Hearing Referee of the Workmen's Compensation Department held that although he believed that granting medical care benefits beyond what was in effect by applicable statute at the time of injury was of doubtful validity, he felt obliged to follow a determination of the Michigan Supreme Court, *Lahti* vs. *Fosterling,* supra, and ordered H. H. Robertson Company and Liberty Mutual Insurance Company to provide continued medical care benefits for the benefit of Larry Newberry.[1] This decision was taken for de novo review, MCLA §§ 413.11, 413.12, to the Workmen's Compensation Appeal Board, MCLA § 408.10. In briefs submitted to the Workmen's Compensation Appeal Board appellants contended, *inter alia,* that the awarding of medical care benefits beyond what was in effect on the date of injury was contrary to the impairment of contracts provisions of Article 1, Section 10 of the Constitution of the United States and the due process provisions of Amendment XIV to the Constitution of the United States.

The Workmen's Compensation Appeal Board noted the position of the appellants, and it too, felt obliged to follow the decision of the Michigan Supreme Court in *Lahti* vs. *Fosterling*[2] supra, and on October 1, 1969, ordered appel-

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[1]Appendix A, page 4a

[2]Appendix B, page 7a

lants to provide medical care benefits in accordance with retroactive application of Public Act 1955, No. 250, § 412.4. It is to be noted that the gratuitous statement in the opinion of the Workmen's Compensation Appeal Board that the issue had not been raised in an earlier proceeding[3] is of no moment. At the time of that proceeding Larry Newberry had not received four 6 month periods of medical care, and was, thus, still entitled to medical care benefits as provided by the statute in effect at the time of his injury.

Appellants sought review of the determination of the Workmen's Compensation Appeal Board by making Application for Leave to Appeal to the Court of Appeals, Michigan General Court Rules of 1963, Rule 806.2, and, while that application was pending filed an Application for Leave to Appeal with the Michigan Supreme Court, Michigan General Court Rules of 1963, Rule 852. In both of the Applications for Leave to Appeal, and in the briefs in support of the Applications appellants contended that the retroactive application of the statute enlarging medical benefits from four 6 month periods to a lifetime, as in the interpretation given in *Lahti* vs. *Fosterling,* supra, was repugnant to the Constitution of the United States as being an impairment of contract, contrary to Article 1, Section 10 of the Constitution of the United States, and was a deprivation of property contrary to due process provisions of Amendment XIV to the Constitution of the United States.

The Court of Appeals denied Application for Leave to Appeal on January 29, 1970.[4] The Supreme Court of Michi-

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[3]Appendix B, page 7a

[4]Appendix C, page 8a

gan treated the application before it as an Application for Leave to Appeal from the denial of the Court of Appeals of January 29, 1970, and on this basis, on June 18, 1970, denied appellants Application for Leave to Appeal.[5]

This appeal, by appropriate filing of Notice of Appeal, was taken to this Court.

## THE QUESTIONS RAISED ARE SUBSTANTIAL

When a State makes a change in its statutes, substantially increasing benefits to one party, and correspondingly increasing the obligation of another party, and does so not only for future transactions, but for all past transactions as well, serious questions of the ability of a state to do this consistent with safeguards provided by the Constitution of the United States are raised.

### The Question of Impairment of the Obligation of Contract

The Michigan Workmen's Compensation Act is, by its terms, a part of the employment contract. Employers subject to the Workmen's Compensation Act are defined as follows:

> "Every person, firm and private corporation, including any public service corporation, who has any person in service under any contract of hire, express or implied, oral or written." MCLA § 411.5

Employees subject to the Act are defined as follows:

> "Every person in the service of another, under any contract of hire, express or implied, . . . ." MCLA § 411.7

The present provisions of the recodification of the Workmen's Compensation Act are substantially identical. See MCLA, 1970 Cumulative Pocket Part §§ 418.151 (b), 418.161(a).

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[5]Appendix D, page 9a

The Michigan Supreme Court has held that liability for compensation benefits is based upon contract.

> "The liability of an employer, by virtue of the Workmen's Compensation Act, rests solely upon contract." *Dettloff* v. *Hammond Standish & Co.*, 195 Mich. 117, syllabus 2.

The extent to which contracts may be changed by retroactive application of legislation is determined in *Home Building and Loan Association* vs. *Blaisdell*, 290 U.S. 398, recently recognized as authoritative in *City of El Paso* vs. *Simmons*, 379 U.S. 497.

The *Blaisdell* decision recognizes as not being repugnant to the provisions of Article 1, Section 10 of the Constitution of the United States changes in existing contracts that are limited and temporary. In looking to the teaching of *Penniman's* case, 103 U. S. 714, this Court in *Blaisdell*, supra, at p. 433, showed an opposition to enlarging existing contract rights, and concomitant obligations, that would seriously impair the value of the contract.

When a statutory amendment enlarges rights to medical benefits from four 6 month periods to a lifeime, so that when these enlarged benefits were here sought, appellants' obligation was increased from nothing to providing medical care to Larry Newberry for the rest of his life, these changes are neither limited or temporary, and most assuredly seriously impair the value of appellants' contract. A decision of a state Court which sustains such changes has clearly violated the teachings of the *Penniman*, *Blaisdell* and *Simmons* cases, supra, and, thus, has impaired appellants' contract rights.

**The Question of Due Process**

There seems little question that cases interpreting the due process provisions of the Fifth and Fourteenth Amend-

ments to the Constitution of the United States have found that legislation which is retroactive and defeats rights which existed or creates new rights where none existed before violates "due process of law." In *Forbes Boat Line* vs. *Board of Commissioners*, 258 U. S. 338, this Court held that it was beyond the power of the Florida Legislature to enact a law which made valid, tolls which had prior to that time been determined invalid. This determination decided that it was beyond the power of a state legislature to retroactively create a private liability. The case of *William Danzer Company* vs. *Gulf R. R.*, 268 U. S. 633, held that due process provisions of the Fifth Amendment prohibited retroactive effect to federal legislation that would create a private liability.

It is recognized in cases applying the due process concept to retroactive legislation that its is beyond the power of Government to give retroactive effect to its action in private matters where no liability, actual or claimed, had existed before. In *Graham & Foster* vs. *Goodcell*, 282 U. S. 409, 426 the Court said:

> "This is not a case of an attempt retroactively to create liability in relation to the transaction as to which no liability has previously attached."

In *Paramino Company* vs. *Marshall*, 309 U. S. 370, 378 the Court said:

> "... this act does not set aside a judgement, create a new right of action or direct the entry of an award. The Hearing provided for is subject to the provisions of the general act, for longshoremen's and harbor workers' compensation. It does not operate to create new obligations where none existed before."

**Decisions from other states applying impairment of contract and due process limitations to substantive legislative change to workmen's compensation benefits.**

The *Lahti* case, and this case in reliance upon the *Lahti* case, has plainly determined that the legislature can, consistent with due process of law, create new rights and have them applied to a transaction as to which liability had previously been discharged. Such a determination has gone beyond what this Court has determined to be due process of law.

Other states have been faced with the problem of whether benefit charges in the workmen's compensation statutes should be retroactively applied. Only two states, Michigan and New York, have determined that there could be retroactive application of benefit changes in workmen's compensation statutes. All other states that have faced this issue have determined that retroactive application would be contrary to due process of law and/or would impair the obligation of contract. See *Preveslin* vs. *Derby and Ansonia Developing Co.*, 112 Conn. 129, 151 Atl. 518; *Gauthier's Case*, 120 Me. 73, 113 Atl. 28; *Yaeger* vs. *Delano Granite Works*, 250 Minn. 303, 84 NW 2d 363; *Haven* vs. *Natchez Times Publishing Co.*, 238 Miss. 121, 117 So 2d 706; *Noffsker* vs. *K. Bernett & Sons*, 72 N. M. 471, 384 P 2d 1022; *State ex rel Frank* vs. *Keller*, 3 Ohio App. 2d 428, 210 NE2d 724; *Salmon* vs. *Denbart Elevators*, 72 SD. 110, 30 NW2d 644; *McClung* vs. *National Carbon Co.*, 190 Tenn. 202, 228 SW2d 488; *Blue Diamond Coal Company* vs. *Pennell*, 203 Va. 49, 122 SE2d 666; *State* vs. *State Compensation Commissioner*, 131 W. Va. 442, 48 SE2d 9; *Sullivan* vs. *Mayo*, 121 S2d 424 and *Mitchell* vs. *United States Fidelity and Guaranty Co.*, 206 F. Supp. 489.

The Michigan determination, *Lahti* vs. *Fosterling*, supra, relied primarily upon New York decision. However, New York has no constitutional limitations upon its legislature's power to enact workmen's compensation laws. All limita-

tions to enact workmen's compensation laws were removed by Article 1, Section 18 of the New York State Constitution.

Further, New York does not recognize its Workmen's Compensation Act as being a part of the employment contract. The leading New York decision *Schmidt* vs. *Wolf Contracting Co.*, 55 NYS2d 162, at pp. 167-168, held:

> "The obligation (for workmen's compensation benefits) is purely statutory and does not arise out of the employer-employee relationship. Liability imposed by the Act is neither ex contractu (citing cases) nor ex delicto (citing cases)."

In all states, save Michigan, that limit their legislative enactments to concepts of due process of law in enacting workmen's compensation statutes, concepts of due process have forbidden retroactive application of substantive legislative workmen's compensation benefit changes.

In all states, save Michigan, that hold that workmen's compensation statutes are a part of the employment contract, impairment of contract obligation limitations have forbidden retroactive application of substantive legislative workmen's compensation benefits changes.

Concepts of due process of law and impairment of contract obligations limitations contained in the Constitution of the United States are not parochial. The decisions of Courts of sister states, together with the decisions of this Court establish that when Michigan allows substantive legislative change in its workmen's compensation statutes to be applied retrospectively, it has acted in repugnance to the impairment of contract provisions of Article 1, Section 10, and the due process provisions of Amendment XIV of the Constitution of the United States.

## CONCLUSION

Retroactive application of substantive statutory change

immediately gives rise to questions of substance. After the fact changes can cause such havoc that limitations on a state government's ability to make such change was made a part of the fundamental law.

When such retroactive change is neither limited nor temporary, but unlimited and permanent the limitations of Article 1, Section 10 of the Constitution of the United States have obviously been exceeded. If changing an obligation to provide medical care from four 6 month periods to a lifetime, which in this instance because of the life expectancy of Larry Newberry could increase appellants obligation by over $100,000.00, does not impair a contract obligation, then Article 1, Section 10 of the Constitution of the United States has lost its protective effect.

Due process, reduced to its essentials, is a concept of fairness. Any rule that has an effect upon transactions that are completed immediately raises questions of fairness. Preparation to meet an obligation, whether imposed by statute or contract or both, must take place when the obligation is created. To require payment from 1966 to an unlimited time in the future of an obligation that on its arising could not go beyond a combined period of four years makes appellants go to resources planned for other purposes. Quite simply, they must rob Peter to pay the obligation the State has, after the fact, changed and determined is owed to Paul. Unfairness is manifest.

The protections afforded to citizens by the contracts clause of Article I, Section 10 and the due process provisions of Amendment XIV of the Constitution of the United States become meaningless, pious phrases if the reasoning of the majority in *Lahti* vs. *Fosterling,* supra, is applied. Every legislative act intends to remedy an ill, and in this sense all legislation is remedial, but, in a constitutional system, the

legislature is not the whole law, and a Court using the term "remedial" in such a way make opinions but a play on words.

Albeit that it is difficult to draw the line between what is, or is not allowable state regulation, the constitutional system and the contracts clause of Article I, Section 10, and the due process provisions of Amendment XIV of the Constitution of the United States, have established that the line must be drawn and the Supreme Court of the United States is to draw it.

In prior decisions of this Court the contracts clause has been interpreted to hold that "limited and temporary" changes in contracts are allowable. However, no balancing of state power can authorize unlimited and permanent changes, as was done here, without repugnance to the limitations of contracts provision of Article 1, Section 10, of the Constitution of the United States.

"Due process" means something other than—anything enacted by a qualified state legislature is allowable. The past acts of legislatures cannot be so meaningless that any change by a subsequent legislature can undo or redo anything that has gone on before. Yet, the majority in *Lahti* vs. *Fosterling*, supra, indicated no practical limit to the state legislature's, power and undo and redo.

The present and future effect of past transactions, whether they be legislative or contractual, necessarily involves fairness and, thus, due process. While most decisions involving retroactive application of statutes are decided by concluding that the intent of the legislative body was for only prospective application, when it is determined otherwise the due process provisions of Amendment XIV to the Constitution of the United States, become applicable. Due process has not allowed for the creation of new obligations

where none existed before, Any statute which enlarges medical benefits from four 6 month periods to a lifetime of medical benefits has created *new* rights and *new* obligations with regard to medical benefits. Anything beyond four 6 month periods, are rights and obligations that did not exist before. In recognizing retrospective application of increased medical benefits the Michigan Supreme Court in *Lahti* vs. *Fosterling*, supra, and the Courts and administrative agencies here, recognized a power in the state legislature repugnant to the due process provisions of Amendment XIV to the Constitution of the United States.

In this instance medical care is largely custodial and its cost is almost entirely provided for by weekly benefits paid from a fund to which all employers subject to the Michigan Workmen's Compensation Act contribute. The unfairness of charging appellants with the cost of medical care in this case is illustrated by the likely conclusion that Larry Newberry will receive no additional benefits from this payment, and the excess caused by payment will go to enriching the Estate of Larry Newberry, and ultimatly, his heirs.

WHEREFORE, Appellants pray that probable jurisdiction be noted, the case be accepted for oral argument and the decision below reversed.

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# APPENDIX A
## STATE OF MICHIGAN
## WORKMEN'S COMPENSATION DEPARTMENT
## LANSING, MICHIGAN 48913
## DECISION

Larry Newberry, by Joseph Newberry, Father and Guardian of Larry Newberry, as continued by the substituted Guardian of Larry Newberry, Kenneth Newberry vs. H. H. Robertson Company and Liberty Mutual Insurance Company plus Second Injury Fund, State of Michigan, 9-26-66, 10-27-66 and a hearing having been held October 2nd, 1967 at Pontiac, Michigan on petition of (plaintiff), I find as follows:

That the above named employe did receive a personal injury arising out of and in the course of his employment by the above named employer on January 13th, 1951, and, as of said date of injury, said employee had an average weekly wage of $115.00, in unskilled labor, and had the following dependents: None. It is found that Defendant Liberty Mutual Insurance Company has voluntarily paid 750 weeks of disability benefits and has, as regards disability benefits, complied with Referee Huber's decision of 2-11-54 (additional findings and orders are set forth on the attached supplement to this decision).

It is Further found that that Employee, Larry Newberry, continues to be Permanently and Totally disabled both in fact and law as defined in Section 8a and 10, Part II, their being no change in this condition since Referee Huber's decision of 2-11-64 on down to this date, except that as of October 17th, 1966 Employee Newberry has been put under confinement for care and treatment. This Employee's Permanent and Total Disability condition falling within the definition set forth in paragraph (a) in Subsection "(b)"

of Section 10 (412.10) of the Act, It Is ACCORDINGLY ORDERED that the Second Injury Fund shall pay Permanent and Total Disability Benefits beyond the 800 weeks or on until the further order of this Department. It is found that the said Second Injury Fund has already paid 50 weeks of such benefits, these having been properly paid after the carrier had properly paid 750 weeks of disability benefits. IT IS ORDERED THAT all benefits paid under this order shall be without interest (See attached Addendum).

JAMES H. COSS
Hearing Referee

Signed this 20th day of May A.D., 1968.

% Plaintiff Attorney Fee Allowed: 25% of Accrued benefits under the award.

Pl: attorney of record: John T. Rogers, Attorney.

This award is not stipulated by the parties.

Further compensation will be paid voluntarily.

APPENDIX A
ADDITIONAL FINDINGS AND ORDERS
(Larry Newberry et al vs. H. H. Robertson Company et al.)

At the time this Defendant Carrier wrote the coverage on this Employer and on the date of personal injury, the applicable statute appeared to limit liability for medical expenses to two years. That is, the Employer and/ or Carrier was to provide six month of medical care then, in accordance with the procedure under Act #288 of 1949, the Employee could apply for three additional six month periods of medical care. In spite of the clear intent of the statute to place some limitation on medical care benefits, The Michigan Supreme Court ruled in *Lahti* vs. *Fosterling*, 357 Mich. 578, in a five to three decision, in an opinion by Justice Kavanagh, that; (At Page 594.)

> "This Court, although reluctant to interpret statutes retrospectively, has done so when the amendment applied to remedies and not to substantive law."

Thus, *Liability was imposed* upon the Defendant (s) for benefits under an amendment to the medical section of the Act (412.4, CL 1948) enacted *in 1955* under Public Act #280 even *though the injury* to Claimant Lahti *occurred in 1954.* The result of this decision was to impose liability for medical benefits that could not have been contemplated by either the Employer, it's Carrier, nor even by the body that enacted the amendment, the Michigan Legislature. Justice Kavanagh summarily disposed of any argument that the decision was violative of the "due process clauses" of the State and Federal Constitutions by citation of a lower Court decision from New York State, *Schmidt* vs. *Wolf* (269 App. Div. 201) which had pronounced such argument as being "without merit." This Referee is of the opinion that the dissenting opinion written by Justice Carr and concurred in by Justices Kelly and Dethmers is the logical and legally correct statement of the law. As set forth by Justice Carr in the "Lahti Case," at page 601;

> ". . . an amendment to the workmen's compensation law enacted after the disability occurred and affecting the right to an award or the amount thereof is not applicable, if giving it effect would bar or decrease an award to an injured employee, or would create or increase liability on the part of the employer. The provisions in effect at the time the right to compensation accrues are controlling."

Even though the recent decision of *Magreta* vs. *Ambassador Steel Company et al,* decided by the Michigan Supreme Court in May 1968 gives some indication that judicial error need not be continued and even though the "Lahti

Case" might have been overruled had the United States Supreme Court been presented with the opportunity to review the Michigan Supreme Court's decision, I; as an administrative hearings Referee, have no alternative but to follow the decision in the "Lahti Case" irrespective of the fact that liability is here being imposed retroactively and regardless of whether this Defendant Carrier may have a clear case for relief in the Federal Courts, Accordingly, and with great reluctance, IT IS HEREIN FOUND that the Defendant Liberty Mutual Insurance Company and Defendant H. H. Robertson Company are obligated under Section 17.154 M.S.A. to provide any and all necessary and reasonable medical care during the Employee's lifetime or until the further order of this Department.

In accordance with this decision, IT IS HEREBY ORDERED THAT Liberty Mutual Insurance Company shall pay to the City of Detroit, $840.00, as per their billing of 7-31-67, and, in addition thereto, shall pay to the Treasurer, State of Michigan, $2,822.30 for the medical care of Larry Newberry from 11-3-66 to 10-2-57. The aforesaid payment of $2,822.30 is based on a daily rate of $8.45 on down to the last hearing date (See Plaintiff's Exhibit #4.). The payments on these charges shall be made payable to the respective Treasurer's for the City of Detroit and the State of Michigan and the drafts or checks in payment shall be sent to the Plaintiff's Counsel. The petitioner's attorney may then arrange with the respective State and City Departments or Agents for a deduction or payment to him of a fee equivalent to 25% of these payments. Thereafter, The Defendant (s) shall arrange for periodic billings from the State of Michigan with payments on all medical expense that is related to this injury continuing until the further order of this Department.

James H. Coss
(Hearing Referee)
Dated: May 20th, 1968

ADDENDUM

(Larry Newberry, by Joseph Newberry, Father and Guardian of Larry Newberry, as continued by the substituted Guardian of Larry Newberry, Kenneth Newberry vs. H. H. Robertson Company and Liberty Mutual Insurance Company plus Second Injury Fund, State of Michigan.)

The usual .05% interest on an award has not been assessed herein for the reasons' that both the Insurance Carrier and the Second Injury Fund, as far as is reasonably ascertainable, did tender and pay all benefits that could be determined by them as owed and the delays in processing this case were due to changes in the Employee's medical treatment and his mental condition during the course of this litigation. Particularly, It is noted that a procedural delay occurred following this Employee's assault upon a police officer. As a consequence of this aggressive act, Petitioner and his Counsel found it necessary to take the additional steps involved in obtaining proofs pertaining to the hospitalization and confinement that resulted from this incident.

Finally, During the course of this litigation, The original Petitioner, Plaintiff's Father and his Guardian, died with a resulting additional delay being involved before Letters of Guardianship were submitted.

On this Guardianship problem, Defendant (s) Counsel has been appraised of the new Guardian's appointment on April 18th, 1968 by the Probate Court for the County of Wayne and that I have accepted in evidence this Court's new Letters of Guardianship, substituting Kenneth Newberry in the place and stead of the original deceased Peti-

tioner and Guardian, Joseph Newberry. Therefore, Unless a formal objection is filed with this Department during the usual time for an appeal of these orders, Defendant (s) shall pay all benefits in satisfaction of this award, to "Kenneth Newberry, Guardian of Larry Newberry for the use and benefit of Larry Newberry." The initial payments under this award shall be sent to the Petitioner's Counsel who shall be entitled to a fee equal to 25% of said initial payments.

James H. Coss
(Hearings Referee)

Dated: May 20th, 1968

(Title of Court and Cause)

## APPENDIX B
## OPINION ON REVIEW
## IVERSON, CHAIRMAN OF THE APPEAL BOARD

Larry Newberry was injured in a fall on January 23, 1951. He was paid 500 weeks of compensation, and subsequently in 1964 was adjudged permanently and totally disabled by reason of incurable insanity and awarded further benefits from the employer and Second Injury Fund. Hearing was later held after the expiration of 800 weeks, whereat the Hearing Referee found Larry Newberry to continue to be permanently and totally disabled and ordered Second Injury Fund benefits to continue, with defendant to provide all reasonable and necessary medical expenses during the employee's lifetime or until further order of the Department, pursuant to the Supreme Court holding in *Lahti* v. *Fosterling,* 357 Mich. 578, however much he disliked to do it. Defendant appealed.

A second issue raised by Plaintiff on cross-appeal has been correctly solved according to information in a stipula-

tion recently filed with the Board, and by this opinion and order the Board dismisses such appeal, incorporating the stipulation therein.

There is no doubt of the correctness of the Hearing Referee's finding of permanent and total disability. The record herein speaks of no other finding for this unfortunate individual.

Defendant's sole issue on appeal is an attack on *Lahti* v. *Fosterling,* supra. The Court there held by controlling voice that medical care amendments are procedural and remedial in effect and that increased liability therefor is to be placed on the employer retrospectively. This issue was not raised in 1964 when permanent and total benefits were first awarded. Defendant admits the Appeal Board is in no position to reverse such holding of the Court, and we thus decide this case so that defendant can go to those who can. The Referee's decision is affirmed with the modification that interest is charged on the Second Injury Fund award pursuant to the stipulation filed with us and plaintiff's appeal is dismissed.

Bowerman, Poehlman and Jarrett concurred.

Dated and entered at Lansing, Michigan, this 1st day of October, A.D. 1969.

WORKMEN'S COMPENSATION
APPEAL BOARD
A. T. Iverson, Jr., Chairman
Williard I. Bowerman, Jr.
R. J. Poehlman
Russell L. Jarrett

Mailed October 1, 1969, Workmen's Compensation Appeal Board.

## APPENDIX C

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the 29th day of January in the year of our Lord one thousand nine hundred and seventy. Present: The Honorable John H. Gillis, Presiding Judge, Vincent J. Brennan, Charles L. Levin, Judges.

John T. Rogers, Guardian of
Larry Newberry,
Plaintiff-Appellee,
vs. No. 8366
H. H. Robertson Company, Liberty Mutual Insurance Co.,
Defendants-Appellants
and
Second Injury Fund,
Defendant-Appellee

In this cause an application for leave to appeal having been filed by defendants, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court;

IT IS ORDERED that the application be, and the same is hereby DENIED for lack of merit in the grounds presented. *Lahti* v. *Fosterling* (1959), 357 Mich. 578.

STATE OF MICHIGAN—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at

Lansing, this 30th day of January, in the year of our Lord one thousand nine hundred and seventy.

Ronald L. Dzierbicki
Clerk.

## APPENDIX D

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 18th day of June in the year of our Lord one thousand nine hundred and seventy. Present: the Honorable Thomas E. Brennan, Chief Justice, John R. Dethmers, Harry F. Kelly, Eugene F. Black, Thomas M. Kavanagh, Paul L. Adams, Thomas G. Kavanagh, Associate Justices.

John T. Rogers Guardian of Larry Newberry,
Plaintiff and Appellee

vs. 52653

H. H. Robertson Co., et al.,
Defendants and Appellants

Second Injury Fund,
Defendant and Appellee

On order of the Court, the application for leave to appeal prior to decision of the Court of Appeals is considered, and the Court having been advised that the Court of Appeals has made its determination, view the application as one for leave to appeal from the January 29, 1970 order of the Court of Appeals and so considered, the same is hereby DENIED, for the reasons that defendants and appellants H. H. Robertson Company and Liberty Mutual Insurance Company have failed to persuade the Court that they have a meritorious basis for appeal or that the determination of the Court of Appeals was clearly erroneous.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 18th day of June in the year of our Lord one thousand nine hundred and seventy.

Donald F. Winters
Clerk.

## *APPENDIX E*

KAVANAGH, J. John Lahti was injured on October 4, 1954, while working as a wood-cutter for the defendant employer. A spruce tree cut by him fell against a dead poplar which broke off and struck his head. He was a bed patient from that time until his death on February 10, 1958. He suffered a comminuted and compound fracture of the skull, permanent paralysis, loss of speech, and inability to consume food in the natural manner, and was totally and permanently disabled, requiring continuous and substantial medical, nursing, and hospital care.

The expense of the continuous hospitalization and medical care was voluntarily assumed by the defendants through October 4, 1956, a period of 2 years, or 4 six-month periods from the date of the injury. Compensation at the regular rate was also paid plaintiff.

On October 25, 1956, an application for hearing and adjustment of claim was filed. The application indicated that the only person dependent upon John Lahti on the date of injury was Alma Lahti, his wife.

The hearing referee found, after a hearing, that the employee did receive a personal injury arising out of and in the course of his employment and ordered payment of compensation at the rate of $34 per week until the further order of the department. He also ordered "that said defendants shall reimburse said employee for all medical care furnished to and made necessary because of his injury for a period of 24 months immediately following October 4, 1954." The referee further found that "defendants have paid or caused to be paid to the plaintiff or his guardian all of the medical bills which they are obligated to pay in this cause."

Plaintiff took the matter to the appeal board. The award of the hearing referee was *affirmed*. Application for leave to appeal to this Court was granted.

Two questions are presented to this Court for decision:

(1) "Is appellant's right to payment of medical and hospital expenses fixed by the statute in effect at the time of the injury?"

(2) "Does the fact of voluntary payment of medical and hospital expenses by appellees, without requiring appellant to first make written application to the commission therefor, during the first 2 years following the injury give appellant a right to recover further compensation for medical and hospital expenses?"

At the time of the injury on October 4, 1954, part 2, § 4, of the workmen's compensation law provided, insofar as is relevant here, as follows:

> "The employer shall furnish, or cause to be furnished, reasonable medical, surgical, and hospital services and medicines when they are needed, for the first 6 months after the injury and thereafter for not more than 3 additional 6 month periods in the discretion of the commission, upon written request of the

employee to the commission for each period and after the employer or his insurer has been given an opportunity to file objections thereto and to be heard thereon." (CLS 1954, § 412.4 [Stat Ann 1950 Rev § 17.154].)

Pursuant to the above section, defendants furnished medical and hospital care to John Lahti for a period of 2 years immediately following his injury.

Effective June 25, 1955, part 2, § 4, of the workmen's compensation law was amended* to provide as follows:

> "The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of his employment, reasonable medical, surgical and hospital services and medicines or other attendance or treatment recognized by the laws of this State as legal, when they are needed, for the first 6 months after the injury and thereafter for such additional 6 month periods as the commission may in its discretion order. Such additional 6 month periods shall be granted only upon written request of the employee to the commission for each period and after the employer or his insurer has been given an opportunity to file objections thereto and to be heard thereon." (CLS 1956, § 412.4 [Stat Ann 1957 Cum Supp § 17.154].)

Plaintiff contends that the 1955 amendment is retroactive in effect and that the appeal board could, in its discretion, grant plaintiff further medical care. Plaintiff bases this claim on the fact that the amendment is remedial, that it is intended to correct an existing injustice, that it does not create a new cause of action, that the elimination of the restriction limiting medical benefits to 4 six-month periods

*PA 1955, No. 250.–REPORTER

was merely the removal of a statutory defense, and that, therefore, the amendment has retroactive effect.

It is the defendants' contention that the right to compensation becomes fixed at the time the cause of action accrues and that subsequent amendments will not operate to either enlarge or cut down such rights. In support of this theory they cite *Allen* v. *Kalamazoo Paraffine Co.*, 312 Mich 575; *Tarnow* v. *Railway Express Agency*, 331 Mich 558, and other cases in which this Court dealt with weekly benefits paid under the workmen's compensation law.

Defendants cite the case of *Dornbos* v. *Bloch & Guggenheimer, Inc.*, 326 Mich 626, as authority for the position that medical and hospital bills are compensation. They also cite *Munson* v. *Christie*, 270 Mich 94, and *Kurtz* v. *Shawley Motor Freight Co.*, 270 Mich 112, which cover sick benefits and death benefits.

In the *Dornbos Case* Justice CARR ruled that hospital and medical services are within the term compensation as the the term is used in the statute of limitations in part 2, § 15, of the act.*

It is to be noted that in all of these cases this Court has emphasized that such benefits are a form of compensation for some purposes but not necessarily for all.

All of these cases are decided upon the theory that rights vested at the time of injury, and since the workmen's compensation act is statutory, and since the employment is based upon a contract, for the legislature to change the remedies would be a violation of the rights of the parties and the contract.

In dealing with the workmen's compensation act it is necessary occasionally to bring ourselves back to the ori-

*See, currently CLS 1956, §412.15 (Stat Ann 1957 Cum Supp §17.-165).–REPORTER

ginal aims and purposes of the act in order to better understand the rights of the parties involved. Naturally, in the construction of the act over a great many years, some unfortunate language has crept into opinions, which, by process of repetition, has become looked upon as the proper construction of the act.

The act was originally adopted to give employers protection against common-law actions and to place upon industry, where it properly belongs, not only the expense of the hospital and medical bills of the injured employee, but place upon it the burden of making a reasonable contribution to the sustenance of that employee and his dependents during the period of time he is incapacitated from work. This was the express intent of the legislature in adopting this law.

Justice NORTH, writing in *Munson* v. *Christie*, 270 Mich 94, 97-99, said:

> "Consideration of the act discloses that insofar as it provides for remedial action, it concerns only 2 classes of persons—employers and employees, the latter term being used in its broader sense as including dependents. *City of Grand Rapids* v. *Crocker*, 219 Mich 178. Herein we are concerned only with employers and employees who are under the workmen's compensation law. All rights and remedies provided by the act are to be asserted and obtained through the commission created by the act. Part 3, § 16 (CL 1929, § 8455).* In no other forum can such rights or remedies be considered and determined. This necessarily follows because employers and employees who are under the terms of the act may not resort to common-

*See currently, CL 1948, §413.16 (Stat Ann 1950 Rev. §17.190). —REPORTER

law actions to secure adjudication of rights and liabilities arising from industrial accidents. Part 3, §16. As to employers and employees under the act 'the right to compensation or damage' incident to an industrial injury suffered by an employee is restricted to such as the act provides. It appears from the title the act is one providing that as against the employer the injured employee and his dependents have no rights and can enforce no liability except those provided in the act. We need not read beyond the title of the act to find this intent and purpose of the legislature clearly expressed. In the body of the act this provision reads:

"'If the employee, or his dependents, in case of his death, of any employer subject to the provisions of this act files any claim with, or accepts any payment from such employer, or any insurance company carrying such risks, or from the commissioner of insurance on account of personal injury, or makes any agreement, or submits any question to arbitration under this act, such action shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury.' Part 6, § 1 (CL 1929, § 8478).*

"See, also, part 3, § 16.

"The workmen's compensation act by legislative fiat fixes the rights and liabilities of employers and injured employees and provides a means or forum for determining such rights and liabilities in cases of controversy between employers and injured employees or their dependents. The primary purpose of

*Part 6, §1 is currently, CL 1948 §416.1 (Stat Ann 1950 Rev. §17.212).—REPORTER

> this legislation is to secure to the injured employee, and in the event of his death resulting from such injury, to his dependents, compensation which the legislature believed should be a charge upon the industry and made payable through the employer."

During the years, with the development of industry and the employment of larger and larger numbers of employees in the business world, the legislature has progressively, even if slowly, kept the act up to date by meeting the changing conditions and requiring industry to assume its share of the new responsibilities. The employers who were happy to be relieved of the old liabilities have sought by legalistic approach of narrow and limited construction of the act to defeat its humanitarian purposes.

One of the changes made through the years was the adoption, effective June 25, 1955, of the amendment to part 2, § 4, of the act (CLS 1956, § 412.14 [Stat Ann 1957 Cum Supp § 17.154]) so that the commission, in its discretion, might order the payment of medical, surgical, and hospital services and medicines for a longer period of time than under the old act. This new amendment did not afford the employee a new cause of action, but merely expanded the remedies then in effect. As was said by Justice BUSHNELL in *Rookledge* v. *Garwood*, 340 Mich 444, 453, in dealing with a similar amendment:

> "There can be no doubt that the legislature, in enacting this amendment, intended to remedy an existing injustice."

Justice BUSHNELL then went on to say (p 454):

> "At the same time it is not amiss to recognize the wisdom of the legislature in remedying a situation which had become detrimental to the public interest.

"The legislature, in adopting the new section 15,* completely abolished the prior section and must, therefore, have intended that the amendment to the act would have sufficient retroactive effect to apply to claims which had arisen prior to the enactment. * * * The intent thus expressed by legislative action should not be altered by judicial construction."

This Court in *People* v. *Lowell,* 250 Mich. 349, 354-356, said:

"An amendatory act has a repealing force, by the mechanics of legislation, different from that of an independent statute. Repugnancy is not the essential element of implied repeal of specifically amended sections. The rule is:

"'Where a section of a statute is amended, the original ceases to exist, and the section as amended supersedes it and becomes a part of the statute for all intents and purposes as if the amendments had always been there.' 25 RCL, Statutes § 159, p. 907.

* * *

"Nevertheless, the old section is deemed stricken from the law, and the provisions carried over have their force from the new act, not from the former. 1 Lewis' Sutherland Statutory Construction (2d ed), § 237.

"It is plain from the authorities in this State and elsewhere that the effect of an act amending a specific section of a former act, in the absence of a saving clause, is to strike the former section from the law, obliterate it entirely and substitute the new section in its place. This effect is not an arbitrary rule

*CLS 1956, §413.15 (Stat Ann 1957 Cum Supp §17.189)—REPORTER

adopted by the courts. It is the natural and logical effect of an amendment 'to read as follows.' It accomplishes precisely what the words import. Any other construction would do violence to the plain language of the legislature."

Justice Carr writing in the case of *Johnson* v. *Motor City Sales Corp.*, 352 Mich 56, citing *Rookledge* v. *Garwood*, 340 Mich 444, as authority for construction of the particular amendment of the workmen's compensation law then under consideration, said (p 62):

> "The scope and construction of the amendment were considered by this Court in *Rookledge* v. *Garwood*, 340 Mich 444, it being there held that the amendment was remedial in character and retroactive in its operation."

The question of determining what is a vested right has always been a source of much difficulty to all courts. The right which defendants claim sprang from the kindness and grace of the legislature. It is the general rule that that which the legislature gives, it may take away. A statutory defense, or a statutory right, though a valuable right, is not a vested right, and the holder thereof may be deprived of it.

This Court in *Harsha* v. *City of Detroit*, 261 Mich 586, 594 (90 ALR 853), said:

> "There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal."

In the case of *Evans Products Co.* v. *State Board of Escheats*, 307 Mich 506, 545, this Court quoted with approval from *Campbell* v. *Holt*, 115 US 620 (6 S Ct 209, 29 L ed 483), as follows:

> " 'The authorities we have cited, especially in this court, show that no right is destroyed when the law restores a remedy which had been lost.' "

The remedy petitioner seeks here would have existed under the common law, but was lost to him under the workmen's compensation act until such time as the present amendment went into effect, and by the amendment this remedy was restored to him. The legislature had the authority to revoke this remedy and, therefore, certainly had the authority to restore it when it saw fit to do so. In the absence of an express intent to make the amendment prospective only, courts must look to the facts and circumstances surrounding the adoption of the amendment to determine whether or not the legislature intended it to be retroactive.

The nature of the workmen's compensation act has been passed upon this Court on numerous occasions, and in the case of *City of Grand Rapids* v. *Crocker*, 219 Mich 178, 189, the Court said:

> "The statute is a remedial one, enacted primarily for the benefit of the man who works in the pursuits subject to its provisions."

Outside of the State of Michigan, New York, in the case of *Matter of Hogan* v. *Lawlor & Cavanaugh Co.*, 286 App Div 600 (146 NYS2d 119), dealt with a provision of the workmen's compensation law where the act in 1932, at the time of the occurrence of the accident, provided that the employer was not liable for medical treatment or medical expenses incurred after the bringing of a third-party action by the injured employee, even though the recovery in the third-party action turned out to be insufficient to cover all such expenses. Furthermore, at that time is was held that medical treatment did not include board, clothing and main-

tenance provided by a mental hospital in which the claimant was confined for custodial care as the result of the injury. The court there said (p 602):

> "Both of these rules were harsh in their operation. They had the effect of relieving the employer of liability for expenses which were unquestionably due to the industrial accident, and throwing the whole burden of such expenses upon the injured employee. In 1944, the legislature decided to remove these inequities from the compensation law."

The amendments took effect on April 1 and April 7, 1944. The principal question was whether the compensation carrier could be held liable for custodial care of the claimant subsequent to the date of the taking effect of the 1944 amendments, notwithstanding the fact that the accident, as a result of which the claimant had been injured, had occurred prior to that date. The court went on to say (p 603):

> "The question is no longer an open one. It was held in *Matter of Metzger* v. *Metzger Press*, 276 App Div 936 (94 NYS2d 220), affirmed 301 NY 781 (96 NE2d 90), that the 1944 amendment to sections 13 and 29 applied to accidents which had occurred prior to the date of the taking effect of the amendment."

In the *Hogan Case* the appellant argued that it was illegal and unjust to impose liability upon the carrier for custodial care occurring after the 1944 amendments because the insurance premiums collected by it from its insured had been based upon liability of a less burdensome character. The court said (p 604):

> "Considerations of that kind are solely for the legislature to weigh, in determining whether to increase the burden of future disability or expenses in pending compensation cases."

The court went on to say (p 604):

"If by the words 'illegal and unjust', the appellant means to question the constitutionality of the statute construed, construed as we have construed it here and as it was construed in the *Metzger Case*, that question was settled in *Matter of Schmidt* v. *Wolf Contracting Co.*, 269 App Div 201 (55 NYS2d 162), affirmed 295NY 748 (65 NE2d 568). In that case, it was held that the legislature had the power to amend the workmen's compensation law so as to increase the rate of weekly compensation payments to be made thereafter to employees who had been injured prior to the taking effect of the amendment. As this court pointed out in the *Schmidt Case* (p 208), 'The amendment in question was enacted in the exercise of the police power of the State and hence violates neither its constitution nor the Federal Constitution. The principle of workmen's compensation is the promotion of public good.'"

Returning to the *Hogan Case*, the court said (p 604):

"The due process clause of the State and Federal Constitutions does not freeze the burden of compensation liability as of the date of the occurrence of an industrial accident beyond the power of legislative change. In carrying out its social purpose, the legislature has the power to increase the burden on the employer for disability or expenses occurring or continuing after the date of the enactment of the amendatory statute, even though the accident which gave rise to the disability or expenses had occurred prior to that time."

In *Matter of Schmidt* v. *Wolf Contracting Co.*, 269 App Div 201 (55 NYS2d 162), the court considered the aims and

purposes of the workmen's compensation law in attempting to arrive at the intent of the legislature to apply a retroactive amendment to workmen injured prior to the effective date of the act, held the legislature had the right to so amend, and applied retrospectively the amended provisions. It further stated it was unreasonable to assume that the legislature intended that a workman who suffers injury on one date is any less affected than one injured on a subsequent date of the same year. With reference to the defense that the contract between the employer and its insurance carrier is impaired by such an amendent and that the statute violates the due process clauses of the State constitution and the Constitution of the United States, the court said (pp 207, 208):

> "That argument is without merit. * * *
>
> "Liability under the workmen's compensation law is contractual, the amendment is not thereby violative of the provisions of the Constitution of the United States. The police power of the State may be exercised to affect the due process of law clause as well as the impairment of contract clause of the Federal Constitution.
>
> "The subject matter of workmen's compensation reposes within the control of the legislature.
>
> "A law enacted pursuant to rightful authority is proper, and private contracts are entered into subject to that governmental authority."

Even though it is a dissenting opinion, Justice Hugo L. Black in *Wood* v. *Lovett*, 313 US 362, 382 (61 S Ct. 983, 85 L ed 1404), correctly states the rule with respect to the contract clause:

> "Societies exercise a positive control as well over the inception, construction and fulfillment of con-

tracts as over the form and measure of the remedy to enforce them. The accuracy of this statement cannot be questioned by one who reflects upon the extent to which contracts and agreements are a part of the daily activities of our society. For, so nearly universal are contractual relationships that it is difficult if not impossible to conceive of laws which do not have either direct or indirect bearing upon contractual obligations. *Therefore, it would go far towards paralyzing the legislative arm of State governments to say that no legislative body could ever pass a law which would impair in any manner any contractual obligation of any kind.* * * * No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. In all such cases the question becomes, therefore, one of reasonableness, and of the that the legislature is primarily the judge." (Emphasis supplied.)

Justice SHARPE in the case of *Allen* v. *Kalamazoo Paraffine Co.*, 312 Mich 575, 576, 577, said:

"Defendants offered to pay compensation for the lesser amount and urge on appeal that the right to compensation arises from the contractual relation between the employer and employee; and that the compensation act in force at the time the contractual relations were entered into governs the substantive rights and obligations of the parties.

"We are not in accord with this theory. Defendant company elected to accept the benefit of the act providing for workmen's compensation as well as

such amendments to the act as the legislature might deem proper to make. See *Cooley* v. *Boice Brothers*, 245 Mich 325."

This Court, although reluctant to interpret statutes retrospectively, has done so when the amendment applied to remedies and not to substantive law.

Justice Cooley in *Gibson* v. *Hibbard*, 13 Mich 214, 219, said:

"As the Constitution does not prohibit the passing of retrospective laws, except when they are of the class technically known as *ex post facto*, congress may unquestionably pass them, even though private rights are affected thereby, unless they are invalid for some other reason than their retrospective character."

In *Peak* v. *State Compensation Commissioner*, 141 W Va 453, 458, 459 (91 SE2d 625), a death case rather than injury, the supreme court of appeals of West Virginia said:

"An act of the legislature, though it have retrospective effect, is not necessarily invalid, and does not, for that reason, come into conflict with any constitutional provision, unless vested, not potential, rights, are disturbed. See *Huntington Water Corp.* v. *City of Huntington*, 115 W Va 531 (177 SE 290); *City of Benwood* v. *Public Service Commission*, 75 W Va 127 (83 SE 295, LRA1915C 261). It is true that this court has held, we believe correctly, that the basis of liability of employers under the workmen's compensation statutes, is contractual. But we can not say that such contractual relationship or liability necessarily precludes a subsequent legislature from effecting changes in the workmen's compensation laws. Those who enter into such con-

tractual relationships do so with knowledge of the right and power of the legislature to enact any new law relating to the subject matter, not in conflict with any constitutional provision; and must be presumed to have agreed to any such change."

18 NACCA Law Journal 128 states as follows:

"Furthermore, these same laws which originally modified contracts of employment by substituting workmen's compensation for employers' liability did not except existing contracts from their operation, and their constitutionality has long been established. *New York C. R. Co.* v. *White* (1917), 243 US 188 (37 S Ct 247, 61 L ed 667, LRA1917D 1). If it is constitutional to totally deprive an employee of the right to seek unlimited damages against his employer by prohibition of common-law suits and substitution of a statutory scheme for payment of fixed benefits, surely it cannot be unconstitutional to so amend the benefit scale provisions as to insure that the amounts to be awarded remain sufficient to carry out the purpose for which the substitution was originally made."

Believing as we do that no vested right or contractual right exists that prohibits the legislature from making a change in the remedies afforded employees under the workmen's compensation law, and keeping in mind the express primary purpose of the act to transfer to industry the expense of injuries to employees growing out of and in the course of their employment, it is apparent to us that the legislature intended, as was held in the *Rookledge Case, supra,* to substitute for the existing remedies under the act some expansion thereof. We find from all facts and circumstances that the legislature intended the amendment

to be applicable to an existing award entered prior to the effective date of the amendment and intended to allow, upon proper application and proofs, additional medical benefits even though all previous benefit periods had been exhausted. We must hold that those cases in conflict with this position are overruled.

In view of the disposition of this first question, it becomes unnecessary to discuss the other question raised.

The appeal board is reversed and the matter remanded for the entry of relief in accordance with this opinion. Costs in favor of appellant.

SMITH, BLACK, EDWARDS, and VOELKER, JJ., concurred with KAVANAGH, J.

## APPENDIX F

CARR, J. (*dissenting*). Plaintiff instituted this proceeding under the provisions of the workmen's compensation law of the State.* The question at issue is whether an employee suffering a compensable injury arising out of and in the course of his employment is subject, as to medical and hospital expenses, to the provision of the statute in effect at the time of such disability. The facts are not in dispute, and in submitting the case to the referee, counsel entered into a stipulation relating thereto in lieu of proofs.

It appears that on October 4, 1954, defendant employer was subject to the provisions of the workmen's compensation law, that plaintiff John Lahti was on said date employed in cutting pulpwood; and that plaintiff was seriously injured as the result of being struck by a falling tree. It was further agreed as follows:

> "That respondent insurance company has provided, on behalf of said defendant, adequate and

*PA 1912 (1st Ex Sess), No. 10, as amended (CL 1948, §411.1 *et seq.*, as amended [Stat Ann 1950 Rev §17.441 *et seq.*, as amended]).

> reasonable medical, surgical and hospital services and medicines for 4 consecutive 6-month periods beginning on the date of said accident and ending October 4, 1956. Said insurer has further paid the said plaintiff, on behalf of said defendant, the sum of $20 per week as compensation for said plaintiff's wage loss, from October 4, 1954 and continues to pay said sum weekly to plaintiff."

Plaintiff sought an award including payment for medical and hospital services rendered to him subsequent to the expiration of the 24-month period for which such expenses had been voluntarily paid by the employer's insurance carrier. The referee in rendering his decision granted plaintiff compensation at the rate of $34 per week for total disability until further order of the department. Liability for the medical and hospital expenses that had been paid was recognized, but the referee found that defendants had paid to the plaintiff or his guardian "all of the medical bills which they are obligated to pay in this cause." Defendants were also given credit for the compensation that had been voluntarily paid. The workmen's compensation appeal board affirmed the award as made by the referee, and plaintiff has appealed.

At the time plaintiff sustained his disabling injury, part 2, § 4, of the workmen's compensation act, as amended (CLS 1954, § 412.4 [Stat Ann 1950 Rev § 17.154]), read as follows:

> "The employer shall furnish, or cause to be furnished, reasonable medical, surgical, and hospital services and medicines when they are needed, for the first 6 months after the injury and thereafter for not more than 3 additional 6 month periods in the discretion of the commission, upon written request of the employee to the commission for each period and after the employer or his insurer has been given

an opportunity to file objections thereto and to be heard thereon. The employer shall also supply to such injured employee dental service, crutches, artificial limbs, eyes, teeth, eye glasses, hearing apparatus and such other appliances as may be necessary to cure, so far as reasonably possible, and relieve from the effects of the injury. If the employer shall fail, neglect or refuse so to do such employee shall be reimbursed for the reasonable expense incurred by or on his behalf in providing the same, by an award of the commission."

Said section was further amended by PA 1955, No. 250, effective June 25, 1955 (CLS 1956, § 412.4 [Stat Ann 1957 Cum Supp § 17.154]). As so amended the section reads:

"The employer shall furnish, or cause to be furnished, to an empoyee who receives a personal injury arising out of and in the course of his employment, reasonable medical, surgical and hospital services and medicines or other attendance or treatment recognized by the laws of this State as legal, when they are needed, for the first 6 months after the injury and thereafter for such additional 6 month periods as the commission may in its discretion order. Such additional 6 month periods shall be granted only upon written request of the employee to the commission for each period and after the employer or his insurer has been given an opportunity to file objections thereto and to be heard thereon. The employer shall also supply to such injured employee dental service, crutches, artificial limbs, eyes, teeth, eye glasses, hearing apparatus and such other appliances as may be necessary to cure, so far as reasonably possible, and relieve from the effects of

> the injury. If the employer shall fail, neglect or refuse so to do such employee shall be reimbursed for the reasonable expense incurred by or on his behalf in providing the same, by an award of the commission."

It thus appears that the the time the plaintiff was injured and became disabled the statute granted him the right to have the expenses of reasonable medical and hospital services incurred by him during the first 6 months after the injury, and thereafter for not more than 3 additional 6-month periods "in the discretion of the commission," paid by the employer or his insurance carrier. By the amendment of 1955 the commission was authorized to award such payments for additional 6-month periods with no limitation as to the number thereof being imposed. It is the claim of appellant in this case that the referee and the workmen's compensation appeal board were authorized to make a further award covering medical and hospital expenses, notwithstanding that defendants had voluntarily paid for such services in accordance with the statute in effect at the time the disability occurred. The referee and the appeal board declined to accept such interpretation of the law, finding that plaintiff had already received at the time the award was made the maximum amount of payment for medical and hospital services that he was entitled to receive. Mr. Justice Kavanagh has written to reverse the action of the appeal board and to remand the proceeding "for the entry of relief in accordance with this opinion." We are not in accord with his conclusion. In our opinion the referee and the appeal board correctly determined the question of law involved, and the award as made should be affirmed.

It is not questioned that the right to compensation under

the statute is subject to the provisions thereof in effect at the time such right accrues. *Mason* v. *Michigan Trading* Corp., 308 Mich 702; *Thomas* v. *Continental Motors Corp.*, 315 Mich 27. In the latter case it was said (p 37):

> "In the instant case the department awarded dependency compensation in accordance with the statute in effect at the time the disability arose. The department also awarded death benefits (expenses of last sickness and funeral) in accordance with the statute in effect at the time the death of the employee occurred. The awards are affirmed."

In *Tarnow* v. *Railway Express Agency*, 331 Mich 558, plaintiff employee's injury was sustained in October, 1938. He was paid compensation for approximately 10 weeks, at the expiration of which period he returned to work. His physical condition became worse, however, with the lapse of time, and in September, 1949, he filed an application for hearing and adjustment of his claim for compensation. Under a 1943 amendment to the statute, if applicable, the claim was barred, such amendment precluding the allowance of compensation for more than 1 year prior to the date of filing same. In said case the beginning of such 1 year period was subsequent to the expiration of the compensable period of 500 weeks as prescribed by the statute. In consequence, the question was squarely presented as to whether the amendment of the statute subsequent to plaintiff's injury controlled with reference to his right to an award of further compensation. On behalf of defendant it was contended, as in the case at bar, that said amendment related to procedure rather than to a substantive right and should, in consequence, be given a retroactive effect. This Court, in rejecting such claim, said, in part (pp 565, 566):

> "The amendment here in question may not be

> regarded as wholly procedural in character as defendant contends. Obviously its effect, if so applied under the facts before us in this case, would result in taking from the plaintiff a right which the statute, in force at the time of his injury, granted to him. There is nothing in the amendment in question here indicating that the legislature intended any such possible result. In other words, there is nothing to overcome the presumption that prospective operation only was intended. It seems obvious that the purpose of the amendment was to limit the amount of recovery in certain cases. Such result must follow in any instance where the statute in its present form is invoked to defeat recovery, partially or wholly, and is applicable. The amendment may not be regarded as relating merely to procedure, nor may it be classed as remedial legislation. Under the general rule followed by this Court in the cases above cited, it should not be given a retroactive effect in the instant case."

In accordance with the conclusion indicated in the opinion, the award to plaintiff was affirmed. We believe the *Tarnow Case* was correctly decided and that an amendment to the workmen's compensation law enacted after the disability occurred and affecting the right to an award or the amount thereof is not applicable, if giving it effect would bar or decrease an award to an injured employee, or would create or increase liability on the part of the employer. The provisions in effect at the time the right to compensation accrues are controlling.

This brings us to a consideration of the question as to whether the payment of expenses for medical and hospital services furnished to an injured employee is to be regarded as compensation. It will be noted that the provisions of the

statute relating to such expenses are in part 2 thereof, which deals with the subject of compensation. The title of the statute, likewise, indicates that the purpose of the legislature in enacting the law was "providing compensation for the disability or death resulting from occupational injuries or disease or accidental injury to or death of employees." It appears from the provisions of the act that the purpose thereof was to allow the payment of compensation to the employee in accordance with the provisions of the enactment for loss of earning ability, for the expense of medical and hospital services incurred as the result of a compensable disability, and for funeral expenses in certain cases. In *Munson* v. *Christie*, 270 Mich 94, 99, it was said:

> "The 'compensation' provided for the employee and his dependents is not only the award in lieu of prospective earnings which the employee loses in consequence of his injury, but 'compensation' in its broader sense as used in this statute includes what may be termed sick benefits for the 90-day period next ensuing the accident and 'in addition' it includes in the event of his death as a result of the injury, the expense of his last sickness and burial, this latter item being limited to $200. These provisions for his care during the first 90 days and for the expense of last sickness and burial are clearly compensation to the employee and his dependents in that they are thereby saved from and compensated for the burden and expense to which they or some of them presumably would otherwise be subjected. While it is true that in some instances in the workmen's compensation act the expression 'compensation' is not used in this broad sense and that the respective phases of compensation are specifically

> referred to in other terms, still consideration of the act as a whole leads to the conclusion that in order to carry out the legislative intent and to properly construe the act, 'compensation' recoverable by the employee and his dependents must usually be understood in its broader sense."

In *Michigan Boiler & Sheet Iron Works* v. *Dressler*, 286 Mich 502, the question was raised whether funeral expenses were to be considered compensation. Commenting thereon, it was said (p 513):

> "Defendant finally contends that funeral expenses are not compensation and that therefore they cannot be recovered in this action. Under statutes in effect in other jurisdictions, hospital, medical, and surgical bills have been held to be 'compensation,' recoverable in a suit by an employer against a negligent third party who has injured an employee. *Klotz* v. *Pfister & Vogel Leather Co.*, 220 Wis 57 (264 NW 495); *Bruso's Case*, 295 Mass 531 (4 NE2d 308). We believe it to have been the legislative intent that funeral expenses should be recoverable as 'compensation' in this particular instance."

In *Dornbos* v. *Bloch & Guggenheimer, Inc.*, 326 Mich 626, certain provisions of the workmen's compensation act were considered, and decisions of this Court and of courts in other States, as well as the supreme court of the United States, were discussed. The conclusion reached was indicated in the following language (p 637):

> "Construing the provisions of the statute here in issue in the light of the general purpose of the entire act, and in conjunction with other pertinent provisions indicating the legislative intent, we think a claim for medical and hospital expenses must be

> regarded as one for compensation and subject accordingly to the prescribed requirements as to the time within which such claim shall be made."

See, also, *Bennish* v. *Cadillac Show Case Co.*, 306 Mich 244, where it was recognized that:

> "The date of disability is the controlling factor insofar as the right to medical services is concerned."

In support of his claim that the 1955 amendment should be given retroactive effect in the instant case, counsel for appellant calls attention to *Rookledge* v. *Garwood*, 340 Mich 444. In that case, however, the change in the law made by amendment to part 3, § 15, did not operate to either lessen or increase liability imposed by the provisions of the statute in force and effect at the time of plaintiff's injury. On the contrary, it affected matters relating to procedure. It operated to deprive an alleged tortfeasor of the possible defense of election of remedies, previously existing. There was no vested right in such defense. The *Rookledge Case* was followed in *Horn* v. *Davis Brothers, Inc.*, 340 Mich 460; *Woods* v. *Ford Motor Company*, 342 Mich 518; and *Johnson* v. *Motor City Sales Corporation*, 352 Mich 56. The case at bar is clearly distinguishable on the facts. Here we are concerned with a subsequent amendment to the law that, if applicable, would permit an increase in the amount of compensation recoverable over and above that provided by the statute in effect when the injury and disability occurred and consequently would impose on the employer a greater measure of liability than was created under the statute in force at the time the right to compensation accrued.

The 1955 amendment did not operate to remove a defense that might be interposed to a claim. The right to compensation rests wholly on the statute, and the legislature in its

discretion imposed a limitation in effect at the time plaintiff was injured. It did not, in other words, grant an unlimited right to compensation for medical and hospital expenses. The amendment of 1955 was designed to permit an increase in an award for such expenses. In other words, it contemplated an extension of liability. It affected the substantive rights of the employee with a corresponding increase in the obligation of the employer. That it was intended by the legislature to be prospective in operation is scarcely open to question. Obviously, if given a retroactive effect a like claim may be made as to any amendment to the act changing rates of compensation for loss of earning ability, or compensation otherwise based.

It is further suggested on behalf of appellant that, since the payments made by defendant were voluntary and not made pursuant to an award based on a written request from the plaintiff, they should not be regarded as made in accordance with the statute. The claim is without merit. Defendants may not be penalized because they voluntarily made the payments for medical and hospital expenses necessitated by the injury to plaintiff instead of waiting for an award to be made. Such payments must be regarded as in compliance with the obligation imposed by the statute, and should be considered accordingly. Their status is the same as that of disability payments voluntarily made, for which credit, as a matter of practice, is properly allowed. This was done in the instant case and apparently is not questioned. See *Marlowe* v. *Huron Mountain Club,* 271 Mich 107, 112; *Tomes* v. *General Motors Corporation,* 318 Mich 168, 173, 174.

Payment by an employer of expenses for hospital and medical services required by an employee as a result of a compensable disability is compensation, and liability

therefor is governed by the provisions of the statute in effect at the time of the disability. It is then that the right accrues to the employee with a corresponding obligation on the part of the employer. A subsequent amendment to the law altering the amount of compensation to be paid involves substantive rights and duties, and may not be regarded as merely a procedural change. The previously created rights and obligations of the parties to the instant proceeding were not affected by the 1955 amendment in question. It does not appear that the legislature intended that said amendment should operate retroactively.

The award as made by the referee and sustained by the workmen's compensation appeal board should be affirmed. The questions at issue being matters of public concern, no costs should be allowed.

Dethmers, C. J., and Kelly, J., concurred with Carr, J.

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IN THE

# Supreme Court of the United States

No. 418

OCTOBER TERM, 1970

H. H. ROBERTSON CO., AND LIBERTY MUTUAL INSURANCE CO.,
Appellants,

v.

KENNETH NEWBERRY, GUARDIAN OF LARRY NEWBERRY,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

## MOTION TO DISMISS OR AFFIRM

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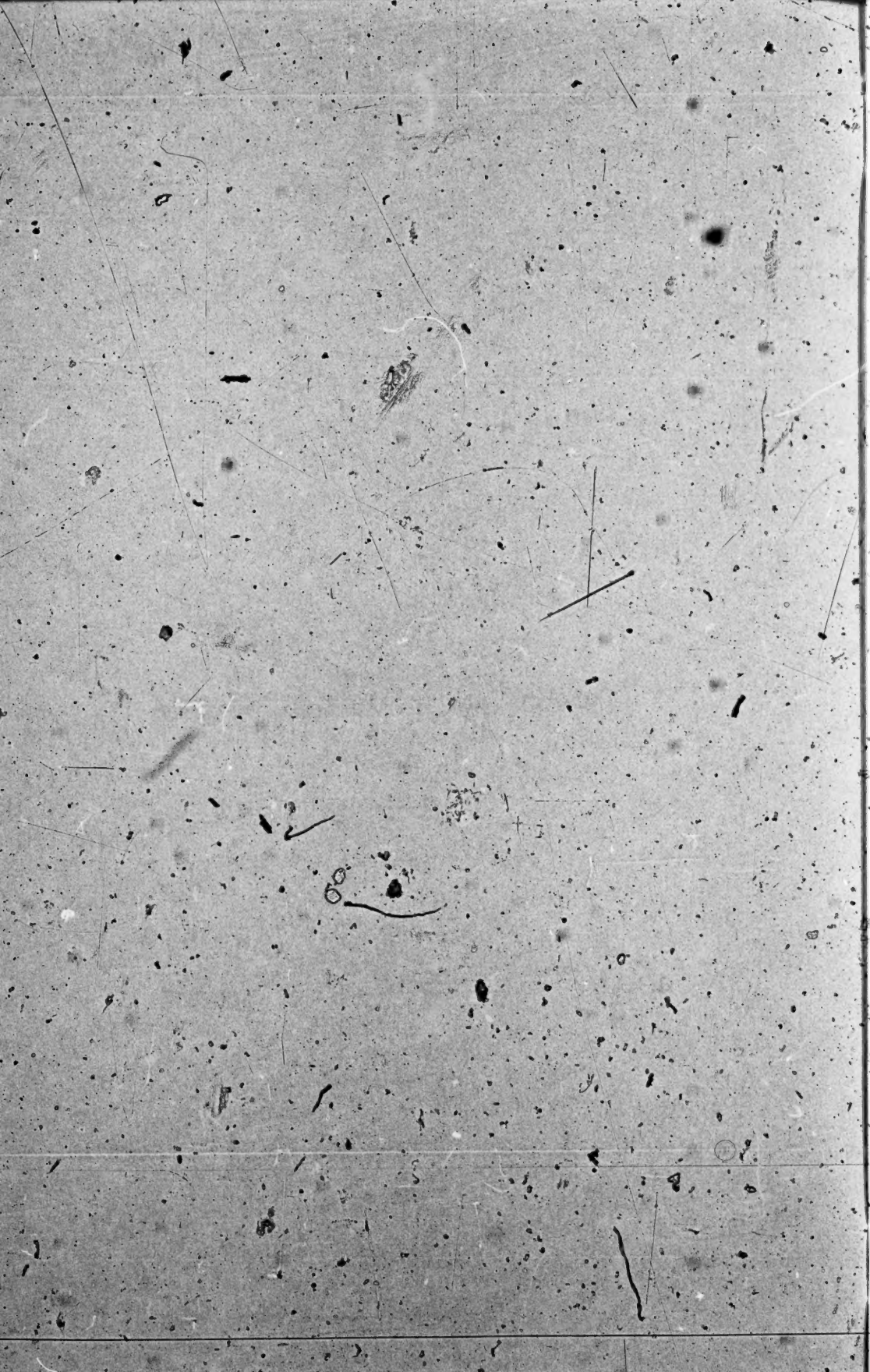

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IN THE

# Supreme Court of the United States

No. 418

OCTOBER TERM, 1970

H. H. ROBERTSON CO., AND LIBERTY MUTUAL INSURANCE CO.,
Appellants,

v.

KENNETH NEWBERRY, GUARDIAN OF LARRY NEWBERRY,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

## MOTION TO DISMISS OR AFFIRM

The Appellee moves the court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Michigan on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

## OPINIONS BELOW

The opinion of the Hearing Referee of the Michigan Workmen's Compensation Department is set forth in Appendix A of Appellants' Jurisdictional Statement. The opinion on review of the Appeals Board is set out as Appendix B of the Jurisdictional Statement. The unreported order of the Michigan Court of Appeals is set forth in Appendix C, and that of the Michigan Supreme Court in Appendix D.

## QUESTION PRESENTED

Whether the application of an amended state workmen's compensation statute, in accordance with legislative intent, extending maximum medical benefits from four six-month periods to an unlimited number of six-months periods, to cover medical expenses incurred subsequent to the amendment by a permanently and totally disabled employee whose original injury occurred prior to the amendment, bears such an attenuated relation to the economic interests of the state and the general welfare of its people, and is so arbitrary, capricious, and clearly unreasonable, as to constitute an impairment of the obligation of contract and a deprivation of property without due process of law, in violation of Article I, Section 10 and the Fourteenth Amendment to the Contitution of the United States?

## STATUTES INVOLVED AND STATEMENT OF THE CASE

On January 23, 1951, Appellee's ward, Larry Newberry, while working as an apprentice structural steel worker for Appellant employer, fell from a scaffolding to the street below and suffered injuries from which he has not and probably will never recover. He was hospitalized until October, 1951 for multiple fractures and other injuries to the head, body, and legs, and thereafter lived with and under the care of his parents. After his discharge, Larry began to manifest symptoms of mental illness, which became progressively pronounced. He received voluntary compensation benefits from Appellant insurer in the amount of twenty-four dollars per week for a period of 500 weeks, and subsequently in 1964 was adjudged permanently and totally disabled by reason of incurable insanity and awarded further benefits from the employer and the Second Injury Fund.

In July, 1966, following the death of Larry's mother, his father, Joseph (then his guardian), found himself no longer able to provide Larry with adequate care. Subsequently, Larry was admitted to the psychiatric ward of Herman Kiefer Hospital and then committed by the Wayne County Probate Court to Northville State Hospital, where he has been a patient ever since. Pursuant to administrative hearings to determine further liability, in May, 1968, the Hearing Referee found that Larry continued to be permanently and totally disabled by reason of incurable insanity; the decision specified that Appellants were obliged by the Workmen's Compensation Act, as amended, to provide all reasonable and necessary medical care during Larry's lifetime or until further order of the Depart-

ment. Appellants' appeal of this decision was subsequently dismissed by the Workmen's Compensation Appeal Board. The Michigan Court of Appeals denied Appellants' application for leave to appeal, and the Michigan Supreme Court denied their application for leave to appeal from the order of the Court of Appeals.

Appellants' appeal in the instant case concerns their liability under the Michigan Workmen's Compensation Act, as amended, for medical benefits. At the time of Larry Newberry's injuries in 1951, the applicable provision was P.A. 1949, No. 238, which provided for a maximum of four six-month periods of medical benefits. In 1955, the provision was amended by P.A. 1955, No. 250, set forth at page four of the Jurisdictional Statement, to allow for an unlimited number of six month periods of medical benefits. The Michigan Supreme Court, in *Lahti v. Fosterling*, 357 Mich 578, 99 N.W. 2d 490 (1959), looking "to the facts and circumstances surrounding the adoption of the amendment," held that the legislature had intended that the amendment be given retroactive application to injuries occurring prior to its enactment and that such application was constitutional. The court further observed that

> "'"(w)here a section of a statute is amended, the original ceases to exist, and the section as amended supercedes it and becomes a part of the statute for all intents and purposes as if the amendments had always been there."'" *Lahti, supra,* at 495.

In denying Appellants leave to appeal, the Michigan Court of Appeals relied upon *Lahti v. Fosterling, supra,* as authority. The Michigan Supreme Court, in denying Appellants' leave to appeal, impliedly did not wish to re-

view again the 1955 statute, involving the same issues it had decided in 1959.

On appeal, Appellants argue that P.A. 1955, No. 250, as construed in *Lahti* and as applied to them in the instant case, constitutes an impairment of the obligation of contract, in violation of Article I, Section 10, as well as a deprivation of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. They pray that probable jurisdiction be noted, that the case be accepted for oral argument, and that the decision below be reversed.

## ARGUMENT

### The Case Presents No Substantial Question Not Previously Decided By This Court

### I.

**INASMUCH AS APPELLANT INSURER ASSUMED THE OBLIGATION, UNDER THE REMEDIAL WORKMEN'S COMPENSATION STATUTE, OF DISCHARGING THE LIABILITY OF APPELLANT EMPLOYER TO ITS INJURED EMPLOYEES, AS MIGHT FROM TIME TO TIME BE DETERMINED BY THE STATE LEGISLATURE, APPELLANTS CANNOT COMPLAIN THAT A LEGISLATIVELY INTENDED AND JUDICIALLY SANCTIONED RETROACTIVE APPLICATION OF AN AMENDMENT TO THE WORKMEN'S COMPENSATION STATUTE, A REGULATION REASONABLY NECESSARY TO SECURE THE GENERAL WELFARE OF THE PUBLIC PURSUANT TO THE EXERCISE OF THE STATE'S POLICE POWER, VIOLATES THEIR CONSTITUTIONAL RIGHT AGAINST IMPAIRMENT OF CONTRACT.**

#### A. The Michigan Workmen's Compensation Law Rests Upon Status Rather Than Contract, And Appellant's Liability Under The Act Is Thus Not Limited To Such Hypothetical Benefits As Might Have Been Due At The Time Of The Issuance To Appellant Employer Of Appellant Insurer's Insurance Policy.

There is nothing immutable about judicial construction of the basis for any given legislation. Although the Supreme Court of Michigan, at the very dawn of American workmen's compensation legislation, did sugest that its statute rested upon contract,[1] the case in which this view

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[1] *Detloff v. Hammond Standish & Co.*, 195 Mich 117, 161 N.W. 949 (1917).

was advanced has not been cited as controlling since 1922.[2] Deferring to the wisdom of the Supreme Court of the United States, the Michigan Supreme Court held in *Crilly v. Ballou,* 353 Mich 303, 91 N.W. 2d 493 (1958) that its Workmen's Compensation statute was not grounded in contract at all, but rather in the power of the state to regulate the employer-employee relationship in the public interest. Quoting with approval the opinion of this Court, through Justice Sutherland, in *Cudahy Packing Company of Nebraska v. Parramore,* 263 U.S. 418, 423 (1923), the Michigan court said that liability under

> "'*Workmen's Compensation legislation rests upon the idea of status, not upon that of implied contract;* that is, upon the conception that the injured workman is entitled to compensation for an injury in the service of an industry to whose operations he contributes his work * * *.'" *Crilly, supra,* at 496. (Emphasis added.)

Thus, the Michigan Supreme Court held in *Lahti v. Fosterling, supra,* that the application of the 1955 amendment to the Workmen's Compensation Act, P.A. 1955, No. 250, to medical expenses incurred subsequent to 1955 by an employee injured prior to 1955 did not involve any question of unconstitutional impairment of contract. Observing that since the "'amendment in question was enacted in the exercise of the police power of the State and hence violates neither its constitution nor the Federal Constitution,'" the court held that the defendant employer, by electing to come under the coverage of workmen's compensation and accept its benefits, had also chosen to accept "'such amendments to the act as the legislature might deem proper to make.'" *Lahti, supra,* at 496, 497, 498. The

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[2] *Fritz v. Rudy Furnace Co.,* 218 Mich 324, 188 N.W. 528 (1922).

court declared further that defendant employer had no vested right to the continuing application of the pre-1955 statutory provisions as to medical benefits.

> "The right which defendants claim sprang from the kindness and grace of the legislature. It is the general rule that that which the legislature gives, it may take away. A statutory defense, or a statutory right, though a valuable right, is not a vested right, and the holder thereof may be deprived of it." *Lahti, supra,* at 495.

The finding that the liability of the employer and his insurer under a workmen's compensation statute is independent of considerations of contract impairment was also advanced by the Supreme Court of Wisconsin in *Douglas County v. Industrial Commission,* 275 Wis. 309, 81 N.W. 2d 807 (1957). Holding that neither the Contract nor the Due Process Clauses applied to legislation retroactively taking from a county the right to offset, against workmen's compensation death benefits due to the widow of a county highway department employee, the amount of benefits payable to her through the state retirement fund, the Wisconsin court said:

> "'when an insurance company undertakes to write workmen's compensation insurance, it assumes the employer's obligation to pay compensation. *The measure of its liability under its policy and the statute is the employer's liability to the injured employee.*' [Court's emphasis] * * * Therefore, when an insurance company issues a policy of workmen's compensation insurance * * *, its obligation is to discharge the full liability of the insured [employer] for workmen's compensation benefits, *not merely such hypothetical benefits as may have been due under the statutes as they stood at the time the policy was issued or when some accident occurred.* [emphasis added] In other words, the company's

> contract under its policy is to pay whatever workmen's compensation benefits the legislature may have seen fit to impose upon the insured * * *. When the policy of coverage is so construed, there is no question of interference with vested rights, or impairment of the obligation of a contract, presented here." *Douglas County, supra,* at 812.

Thus, in the instant case, Appellants' reliance upon Article I, Section 10 of the Constitution of the United States is misplaced. It is significant that at no point in their Jurisdictional Statement do Appellants refer to the specific provisions of any existing contract allegedly being impaired. Nor, if there is such a contract, do they demonstrate that it does not fix liability according to prevailing public policy, as do the workmen's compensation policies of other insurers in Michigan. In any case, as the Supreme Court of Ohio aptly noted, "the exercise of the police power cannot be headed off by the making of contracts reaching into the future."[3]

**B. The Michigan Workmen's Compensation Act Is Remedial, Whether It Is Grounded In Contract Or Not, And As Such, Is Within A Class Of Legislation Held By This Court To Be Susceptible To Retroactive Modification.**

This Court, in a landmark decision, *Home Building & Loan Association v. Blaisdell,* 290 U.S. 398 (1934), had occasion to consider the relationship between retroactive legislation and Article I, Section 10 of the Constitution, forbidding the impairment of the obligation of contract. Sustaining the Minnesota Mortgage Moratorium Act,

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[3] *Benjamin v. City of Columbus,* 167 Ohio St. 103, 146 N.E.2d 854 (1957).

which authorized state courts to extend the period of redemption from foreclosure sales "for such additional time as the court may deem just and equitable," this Court observed that the prohibition of the Contract Clause "is not an absolute one and is not to be read with literal exactness like a mathematical formula." *Blaisdell, supra,* at 428. Having thus determined that no touchstone existed by which the constitutionality of all retroactive regulation of contracts could be judged with precision, this Court created the now well-known distinction between retroactive modification of contractual rights and of contractual remedies; without passing on the contitutionality of the former, the Court held that " 'it is competent for the States to change the form of the remedy, or to modify it otherwise, provided no substantial right secured by the contract is thereby impaired.' " The test ultimately became "one of reasonableness, and of that the legislature is primarily the judge." *Blaisdell, supra,* at 430. In construing the Minnesota statute in question, the Court noted that it was of an emerency and temporary nature, but, as it made clear in *City of El Paso v. Simmons,* 379 U.S. 497 (1965), these conditions were not in themselves necessary to sustain the constitutionality of the act. Of equal or greater importance were the reasonableness of the statute and the necessity presented "for the protection of a basic interest of society." *Blaisdell, supra,* at 445.

Michigan is among the several states which have made the determination that its Workmen's Compensation statute is remedial in character and is "enacted primarily for the benefit of injured employees and not injured employers." *Wilson v. Doehler-Jarvis Div. of National Lead Co.,* 358 Mich 226, 100 N.W.2d 226, 228; *Lahti v. Fosterling, supra,* at 494, 496; *accord, McLain v. Carolina Power & Light Company,* 172 F. Supp. 273, 275 (D. S.C. 1959); *Gilligan v. International Paper Co.,* 24 NJ 230, 131 A.2d

503, 506 (1957); *Dupree v. Barney,* 193 Pa Super. 331, 163 A.2d 901, 904 (1960); *Gill v. Krupec,* 184 Neb 436, 168 N.W.2d 377, 379 (1969); *Dunlap v. Industrial Commission,* 90 Ariz 3, 363 P.2d 600, 602 (1961); *McGehee Hatchery Company v. Gunter,* 373 S.W.2d 401, 403 (Ark 1963); *B. W. Sales Company v. Industrial Commission,* 35 Ill 2d 418, 220 N.E.2d 405, 407 (1966); *Riley v. Perkins,* 282 Ala 629, 213 So. 2d 796, 798 (1968). The reasonableness of the determination is readily apparent; it is now trivial to observe that under workmen's compensation statutes, injured workmen surrender their common law remedies arising out of actions for damages, pain, and suffering, sounding in tort, in return for the relative security of guaranteed, but more modest, compensation for loss of earning capacity due to industrial accident. The liability of employer and insurer is not fixed by a contractual agreement between the two, but by the legislature, and thus there are created no vested substantive rights in the employer and his insurer upon which subsequent legislative modifications of the employee's statutory remedies may infringe. In fact, workmen's compensation legislation falls squarely within the definition of remedial legislation propounded by the Supreme Court of Iowa.[4] "Legislation providing the means or method whereby causes of action may be effectuated, wrongs be redressed, and relief obtained is remedial."

Therefore, it is immaterial whether liability under the Michigan Workmen's Compensation Act is grounded in contract or the sovereign power of the state to protect the welfare of its people. In either case, P.A. 1955, No. 250 affects only remedies, which this Court has held to be capable of retroactive modification.

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[4] *Schmitt v. Jenkins Truck Lines, Inc.,* 149 N.W.2d 789, 792 (Iowa, 1967).

**C. The Application Of P.A. 1955, No. 250 To The Medical Expenses Of Appellee's Ward, In Furtherance Of The Humanitarian Purposes Of The Workmen's Compensation Act Even If Held To Affect Substantive Contractual Rights, Would Escape Constitutional Offensiveness As A Valid Safeguarding Of The Vital Interests Of The Public.**

In *Blaisdell,* this Court, through its emphasis upon the great discretion accorded the state in its exercise of the police power, laid the groundwork for the finding that a state may through legislation retroactively modify substantive contractual rights and obligations.

> "Not only is the constitutional provision [against impairment of contracts] qualified by the measure of control which the state retains over remedial processes, but the state also continues to possess authority to safeguard the vital interests of its people. * * * Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. * * * 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject matter.'" *Blaisdell, supra,* at 434, 437, 438.

Thus, the language of the Court suggested that the state's power to legislate in the public interest is independent of, and unqualified by, its power retroactively to modify contractual remedies. The suggestion was made explicit in *City of El Paso v. Simmons, supra.* Holding that a Texas statute, retroactively limiting the obligation of the state to reinstate lands forfeited under public land sale contracts for nonpayment of interest, did not violate

the Contract Clause, the Court, through Justice White, declared that "it is not every modification of contractual promise that impairs the obligation of contract, any more than it is every alteration of existing remedies that violates the contract clause." *City of El Paso, supra,* at 506 507. Citing with approval the above-quoted language in *Blaisdell,* the Court concluded that the

> "'economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts: * * *The State has the 'sovereign right * * * to protect the * * * general welfare of the people * * *. Once we are in this domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.'" *City of El Paso, supra,* at 508, 509.

After *City of El Paso,* then, the Court's rule is that contractual rights, as well as remedies, may be modified retroactively, without doing violence to the Contract Clause, if in the judgment of the legislature the economic interests of the state or the general welfare of its people require such action. Nor is a state bound by archaic or obsolete notions as to what forms of state regulation in the public interest are proscribed by Article I, Section 10. For in the words of the late Chief Justice Hughes, "[i]t is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time." *Blaisdell, supra,* at 442.

It is not disputed by Appellants that, as construed by the Supreme Court of Michigan, the intent of the legislature was that P.A. 1955, No. 250, extending medical benefits, was to be applied retroactively to medical expenses incurred after 1955 arising out of injuries occur-

ring prior to 1955. Appellants argue only that such an amendment, as thus construed, is unconstitutional. Nonetheless, the legislature was accorded "wide discretion * * * in determining what is and what is not necessary," and was acting well within this discretion when it concluded that a retroactive application of the amendment was necessary to bring about the humanitarian purpose for which the Act was originally created—placing upon industry, and ultimately the consumer, the cost of injury to its workmen, the victims of a vast and often impersonal system of industrial output. *Lahti, supra,* at 493. This legislative judgment has been echoed in the holdings of several other state courts. "These Compensation Acts are entitled to and have universally received a liberal construction from the courts. The humanitarian objects of such laws should not, in the administration thereof be defeated by overemphasis on technicalities—by putting form above substance." *Parrish Esso Service Center v. Adams,* 374 S.W. 2d 468, 471 (Ark 1964); *accord, Kiger v. Idaho Corporation,* 85 Idaho 424, 380 P.2d 208, 212 (1965). "[W]orkmen's Compensation laws [should] be liberally construed in favor of extending their benefits." *Subsequent Injuries Fund v. Industrial Accident Commission,* 31 Cal Rptr. 477, 382 P.2d 597, 598 (1963); *accord, Riley v. Perkins, supra,* at 798. Thus, the application of the Workmen's Compensation Act, as amended, to the medical expenses of Appellee's ward, is not violative of the Contract Clause, even if it were held that contractual rights and obligations were somehow affected.

## II.

**THE MICHIGAN WORKMEN'S COMPENSATION ACT, AS AMENDED, BEARS A REAL AND SUBSTANTIAL RELATION TO ITS OBJECT—PROMOTING AN EQUITABLE DISTRIBUTION OF THE ECONOMIC BURDEN OF INDUSTRIAL INJURY—AND, AS SUCH, IS NOT SO ARBITRARY, CAPRICIOUS, OR CLEARLY UNREASONABLE AS TO DEPRIVE APPELLANTS OF PROPERTY WITHOUT DUE PROCESS OF LAW.**

In another landmark case, *Nebbia v. New York,* 291 U.S. 502 (1934), this Court repudiated the policy established by the *Lochner* decision in 1905, of substituting its judgment for that of the several state legislatures as to the wisdom and propriety of particular economic and social regulations.[5] Its current position was definitely expressed by Justice Roberts, writing for this Court in *Nebbia.*

> "[*R*]*ights* * * * *of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and* * * * *of the state to regulate the use of property and the conduct of business, are always in collision.* No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint, *the private right must yield to the public need.*
>
> "The * * * Fourteenth [Amendment], as respects state action, do[es] not prohibit governmental regulation for the public welfare. [It] merely con-

[5] It should be noted that three of the four cases cited by Appellants, at page ten of the Jurisdictional Statement, in support of their due process argument, were decided prior to *Nebbia*, in the heyday of substantive due process. The fourth decision, *Paramino*, upheld the constitutionality of the act in question.

> dition[s] the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And *the guarantee of due process * * * demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.*" *Nebbia, supra,* at 524, 525. (emphasis added)

Any doubt concerning this Court's unwillingness to reenter the swamp of substantive due process was removed by *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483 (1955), which, through Justice Douglas, declared that

> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or *out of harmony with a particular school of thought.*" *Williamson, supra,* at 488. (emphasis added)

This clear statement renders irrelevant Appellants' observation that Michigan is in the minority in regard to the issue in the instant case. Those states clearing the way for the rest in the field of social and economic legislation have always been in the minority—at least for a time. Indeed, the doctrine that the states should act as laboratories for social and economic experimentation itself encourages such venturing forth.

In any case, the class of workmen's compensation legislation, of which P.A. 1955, No. 250 is an example, has long since been protected by this Court from constitutional attack. In *Cudahy,* this Court said that workmen's compensation legislation, tending

> "to promote a more equitable distribution of the economic burden in cases of personal injury or death resulting from accidents in the course of industrial employment, is a matter of sufficient public concern [citations omitted] to escape condemnation as arbitrary, capricious, or clearly unreasonable." *Cudahy, supra,* at 423.

P.A. 1955, No. 250 clearly has the purpose of promoting "a more equitable distribution of the economic burden" of industrial injury. It explicitly removes the cost of a remaining lifetime of hospitalization and despair from the shoulders of the guardian-brother of an unfortunate workman, and places the burden where it belongs—on the industry which bears legal and moral responsibility for that shattered life. "The employers who were happy to be relieved of the old liabilities have sought by legalistic approach of narrow and limited construction of the act to defeat its humanitarian purposes." *Lahti, supra,* at 494. Let them not succeed in eviscerating an act, which, for 15 years, has fulfilled the original promise of workman's compensation, on the basis of which thousands of claims have been paid and related contractual arrangements established, and for which Appellants through the upward revision of premium rates, have had ample time to prepare. Any change in the interpretation or legal effect of the statute at this juncture would only confound established relationships and result in a windfall to the insurance industry.

## CONCLUSION

Wherefore, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Michigan.

Respectfully submitted,

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## APPENDIX

1. Article I, Section 10, to the Constitution of the United States of America provides in part:

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ".

2. Amendment XIV to the Constitution of the United States of America:

> ". . . nor shall any State deprive any person of . . . property, without due process of law; . . . ".

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IN THE

# Supreme Court of the United States

OCTOBER 1970 TERM

No. 418

H. H. ROBERTSON CO., and LIBERTY MUTUAL INSURANCE CO.,
Appellants,

vs.

KENNETH NEWBERRY, Guardian of Larry Newberry,
Appellee.

## BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

The arguments presented to support the position that there is no substantial federal question are fallible. We wish here to oppose these arguments by argument organized in the order of arguments presented in Appellee's Motion to Dismiss or Affirm.

## I.

### A. The rights and duties of the Michigan Workmen's Compensation Act are based upon Contract.

The case cited in the Jurisdictional Statement as being dispositive of the issue of whether Michigan workmen's compensation rights and obligations are based upon contract, *Dettloff v. Hammond Standish & Co.*, 195 Mich. 117, does not stand alone like an old sentinal to a forgotten army. The proposition for which it was cited has been followed in numerous cases in addition to the one instance related by Appellee.

*Crane v. Leonard, Crossette and Riley,* 214 Mich. 218; *Wood v. Vroman,* 215 Mich. 449; *Boshaw v. J. J. Newberry Co.,* 259 Mich. 333; *Roberts v. I X L Glass Co.,* 259 Mich. 644 and *Thomas v. Parker Rust Proof Co.,* 284 Mich. 260 are some of the cases in addition to *Detloff v. Hammond Standish & Co., supra,* and *Fritz v. Rudy Furnace Company,* 218 Mich. 324 that have recognized the principle that rights and obligations dealing with Michigan workmen's compensation benefits are based on contract. As recently as November, 1967 in *Fox v. Employment Security Commission.* 379 Mich. 579, the Michigan Supreme Court recognized the applicability of argument that workmen's compensation rights and liabilities are based on contract, although decision was based on other grounds:

> "Plaintiff further contends that his right to workmen's compensation benefits vested as of the date of injury in 1955, and that therefore (a) he is deprived of property without due process of law, and (b) there is an impairment of the obligations of contract when the legislature attempts to affect this vested right by providing that he must give up the same amount of unemployment compensation bene-

fits to which he would otherwise be entitled." *Fox v. Employment Security Commission, supra,* at p. 586.

The provisions of the Michigan Workmen's Compensation Act which make it applicable to employers and employees makes it so because each has a contract of hire arrangement with the other. MCLA §§ 411.5, 411.7, 1970 Cumulative Pocket Part §§ 418.151(b), 418.161(a). The Michigan Supreme Court has consistently recognized that the rights and obligations determined by the Workmen's Compensation Act are based upon the contract between the employer and employee.

*Crilly v. Ballou,* 353 Mich. 303, does not relate to the issue of whether the rights and obligations of workmen's compensation are based on contract. The issue there, as it was in *Cudahy Packing Company of Nebraska v. Parramore,* 263 U.S. 418, dealt with how a provision of a workmen's compensation act should be interpreted. The provision was "arises out of and in the course of employment" in *Crilly* and "arises out of or in the course of his employment" in *Parramore.* Simply put, the Court in each case was determining how a provision of the statute that was a part of the employment contract should be interpreted; by prior standard used in negligence or agency cases, or by a new standard more appropriate to the purposes of workmen's compensation. Each case determined that the statutory phrase which determines applicability of the workmen's compensation act should not be determined by the same standards as "scope of employment" was determined in applying the doctrine of *"respondeat superior"* to negligence and agency cases.

Michigan, by its Workmen's Compensation Act as applied by the Supreme Court of Michigan, has determined

to provide workmen's compensation benefits by making the legislation a part of the employment contract. The quotation from *Crilly v. Ballou, supra,* because it is taken out of context, does not change the long recognized principle that Michigan workmen's compensation rights and obligations have their base in the employment contract.

The majority of the Michigan Supreme Court, in *Lahti v. Fosterling,* 357 Mich. 578, operated under a misconception that the power of the legislature was total and complete. This is indicated by a total absence of any mention of limitation upon the police power of the state and the statement that rights created by exercise of the police power "sprang from the kindness and grace of the legislature." *Lahti v. Fosterling, supra,* at pp. 588-589. This misconception demonstrates a failure to recognize certain fundamental limitations upon a legislature that are inherent in a constitutional government; limitations that are spelled out in Article I, Section 10 and Amendment XIV of the Constitution of the United States.

When a constitution guarantees certain limits upon unfettered legislative power, there are bound to be conflicts as to whether certain legislative acts infringe upon constitutional guarantees. When a state Court of last resort has concluded that the legislature has made retroactive a provision which is a part of an employment contract and that provision has changed the employer's contract obligation from one that is discharged to one that has no limit, but will exceed $110,000.00 if limited by a normal life expectancy and hospital rates in effect in 1966 ($8.45 per day) the issues raised are not so inconsequential as to be dismissed by stating, "exercise of the police power".

Citation of, and quotation from *Douglas County v. Industrial Commission,* 275 Wis. 309 is another attempt to

take the instant case out of its proper frame of reference by taking a quotation out of context. The unquestioned holding in the *Douglas County* case was that a state could legislate retroactively so as to change a contract to which a subdivision of a state was a party if the other party to the contract agreed to the change. This, implicitly, accepts that as between a private employer and his employees, Wisconsin recognizes, as do all other states but New York that have decided the issue, workmen's compensation rights and obligations are based upon contract and are subject to impairment of contract constitutional limitations.

We, by no means, contend that legislative change can be "headed off" by making a contract. We do contend that retroactive legislative change regarding rights and obligations based on contract raise substantial constitutional questions dealing with impairment of contract and due process of law. When, as a part of the employment contract, medical benefits are specifically limited by statute to four 6 month periods, and after these benefits have been exhausted it is held that these specifically limited benefits have been changed so that there is no limit to an employee's right and no limit to an employer's obligation for medical benefits, as is demonstrated by the record in this case, we believe that the contract provision impaired is demonstrated with sufficient specificity.

**B. The changes made enlarging rights and obligations for medical benefits for injured workmen by the Michigan Legislature by PA 1955, No. 250 were substantive and not remedial.**

When workmen's compensation legislation was first enacted in Michigan by PA 1st Extra Session of 1912, No. 10, there is no one who would question that the provisions contained in the enactment granting weekly benefits and medical benefits were substantive rather than procedural provisions. Any reasoning that concludes that changes in these benefits since that time are not substantive but relate to the remedy is so grossly unsound as to be less than sophistry.

The provisions of PA 1955, No. 250 here in question did nothing regarding how benefits were to be awarded or received; did nothing to enlarge or shorten the time within which the benefits could be sought, and did nothing relating to the tribunal created to administer the rights and obligations of the Workmen's Compensation Act. There are instances when distinguishing between substance and procedure is difficult, for a right without a remedy is of no more benefit than no right at all, but, that difficulty is not present here. PA 1955, No. 250 changed the substance of medical benefits but did nothing as to how the substance was to be obtained.

The Michigan Supreme Court, In *Lahti v. Fosterling, supra,* enlarged the definition of remedy to make it so big as to include both substance and precedure, and then applied a rule intended to be applied only to procedure. When this is done to evade the applicability of constitutional limitations of impairment of contract and due process of law, constitutional questions of serious consequence are raised.

**C. Comparing the Determinations of this Court in the *Blaisdell* and *City of El Paso* cases with the instant case is helpful and establishes that this case raises substantial constitutional questions.**

We do not question that there are instances when substantive contractual rights may be interfered with by legislation when the circumstances are that a *vital* interest of the people establishes the need. The vital interest of the people in the *Blaisdell* and *City of El Paso* cases is obvious and obviously vital. The maintenance of stability in land purchases and the prevention of large numbers of equitable forfeitures brought about by the greatest economic panic in this nation's history was the obvious vital interest served by the legislation in *Blaisdell.* The necessity of barring stale claims to large and important areas of land was the obvious vital interest served in *City of El Paso.*

Prior to adoption of PA 1955, No. 250 the Michigan Workmen's Compensation Act had been amended forty-eight times. Thirteen of these amending acts enlarged benefits and medical benefits were enlarged four times. None of the prior acts making substantive changes in the rights and obligations of employers and employees was retroactive, and several were much more comprehensive than the amendment in issue, PA 1937, No. 61, bringing occupational disease within the protection of the act, being an example. It must be concluded that in these amendments there was no interest so vital to the people that retroactive effect and impairment of contract was necessary. There is nothing apparent that makes the forty-ninth amendment any different than its predecessors.

There is nothing comparable between the vital interest of the people in having some stability in land purchases protected from the effects of the nation's greatest economic

calamity, and the instant case. Equally, there is no comparison between the instant case and the basic necessity of barring stale claims to large and important areas of land. The *Blaisdell* and *City of El Paso* cases are not supportive of the determinations in this case. The basis of decision in the *Blaisdell* and *City of El Paso* cases—extra-ordinary, vital interests of the people requiring limited interference with contract rights—is not in harmony with the determinations in this case. Because it is not, this case raises substantial constitutional questions.

## II.

**Police power legislation that regulates insurance premiums, and then after they are set and collected adds to the risk that was contemplated when the rates were approved, and requires payment of the loss of the retroactively added risk is arbitrary and unreasonable and violates due process of law.**

There are fundamental differences between the situations in *Nebbia v. New York*, 291 US 502 and *Williams v. Lee Optical of Oklahoma*, 348 US 483 and the situation here. The legislation in the *Nebbia* and *Williams* cases regulated how property could be *used* in commerce. Although the use of property was limited, it was not taken. Nebbia could sell his milk, he was required to sell it at no less than nine or ten cents a quart depending upon the character of the sale. Lee Optical could dispense lenses, but it could be done only by prescription of an optometrist or ophthalmologist. Nothing was entirely taken from Nebbia or Lee Optical and given to someone else after all the elements of a transaction were fixed.

It is to be hoped that the day is not yet gone when the Supreme Court of the United States determines that it is

contrary to basic elements of fairness, due process of law, for a state legislature to spell out the rights and obligations of parties, and then substantially later, after all of the elements of determining the rights and duties have been set, and the time for preparing for the obligations has passed, enlarge the rights and the duties infinitely and demand and enforce payment.

Legislation that is fair in the regulation of the use of property does not determine that the taking of wealth and redistributing it, after the elements determining where the wealth should be are fixed, is fair. Whether a taking and redistribution of wealth under the circumstances of this case is fair, or can be fair, within the limits of due process, is not determined by the *Nebbia* or *Williams* cases. The same principle that determined Florida legislation to be contrary to due process of law in *Forbes Boat Line v. Board of Commissioners*, 258 US 338 makes the issue of this case, at least, a substantial issue of constitutional law.

There is an analogy between the *Nebbia* and *Williams* cases and this case for the state has legislated as to how premium rates for workmen's compensation liability insurance policies are to be regulated.

> "Sec. 2400. The purpose of this chapter is to promote the public welfare by regulating insurance rates to the end that they shall not be excessive, inadequate or unfairly discriminatory, and to authorize and regulate co-operative action among insurers in rate making and in other matters within the scope of the insurance code. Nothing in the chapter is intended (1) to prohibit or discourage reasonable competition, or (2) to prohibit, or encourage except to the extent necessary to accomplish the aforementioned purpose, uniformity in insurance rates, rating systems, rating plans or prac-

tices. This chapter shall be liberally interpreted to carry into effect the provisions of this section."

MCLA §500.2400.

"Sec. 2403. (1) All rates shall be made in accordance with the following provisions:

(a) Due consideration shall be given to past and prospective loss experience within and outside this state, to catastrophe hazards, if any, to a reasonable margin for underwriting profit and contingencies, to dividends, savings or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members or subscribers, to past and prospective expenses both countrywide and those specially applicable to this state, to underwriting practice, judgment, and to all other relevant factors within and outside this state;

(b) The systems of expense provisions included in the rates for use by any insurer or group of insurers may differ from those of other insurers or groups of insurers to reflect the requirements of the operating methods of any such insurer or group with respect to any kind of insurance, or with respect to any subdivision or combination thereof for which subdivision or combination separate expense provisions are applicable;

(c) Risks may be grouped by classifications for the establishment of rates and minimum premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans which measure variations in hazards or expense provisions, or both. Such rating plans may measure any differences among risks that may have a probable effect upon losses or expenses as provided for in subdivision (a) of subsection (1) of this section;

(d) Rates shall not be excessive, inadequate or unfairly discriminatory.

(2) Except to the extent necessary to meet the provisions of subdivision (d) of subsection (1) of this section, uniformity among insurers in any matters within the scope of this section is neither required nor prohibited."

MCLA §500.2403

"Sec 2406. (1) **Filings by insurer on its own behalf.** Every insurer shall file with the commissioner every manual of classifications, every manual of rules and rates, every rating plan and every modification of any of the foregoing which it proposes to use. Every such filing shall state the proposed effective date thereof, and shall indicate the character and extent of the coverage contemplated. When a filing is not accompanied by the information upon which the insurer supports such filing, and the commissioner does not have sufficient information to determine whether such filing meets the requirements of this chapter, he shall within 10 days of such filing give written notice to such insurer to furnish the information upon which it supports such filing. The information furnished in support of a filing may include (a) the experience or judgment of the insurer or rating organization making the filing, (b) its interpretation of any statistical data it relies upon, (c) the experience of other insurers or rating organizations, or (d) any other relevant factors. A filing and any supporting information shall be open to public inspection after the filing becomes effective.

"(2) **Filings by licensed rating organization.** An insurer may satisfy its obligation to make such filings by becoming a member of, or a subscriber to, a licensed rating organization which makes such filings, and by authorizing the commissioner to accept such filings on its behalf: Provided, That

nothing contained in this chapter shall be construed as requiring any insurer to become a member of or a subscriber to any rating organization."

MCLA §500.2406

"Sec. 2412. No insurer shall make or issue a contract or policy except in accordance with filings which are in effect for said insurer as provided in this chapter or in accordance with sections 2410 or 2414."

MCLA §500.2412

Pursuant to these statutes all insurers of workmen's compensation liability have their rates determined by the Insurance Commissioner by using the services of the Michigan Workmen's Compensation Rating Bureau. The method used by the Bureau and approved by the Insurance Commissioner is the same method used in all but a few of the states that allow workmen's compensation liability to be insured. The method of calculating premiums is complex, but a lucid explanation of the theory and practice of this rate making can be found in Heitzmann, *Workmen's Compensation Manual Rate Making,* Annals of the Society of Chartered Property and Casualty Underwriters, Vol. 17, Edition 3, pp. 197-212, Fall 1964.

Basic to this rate making is the use of past experience which is used to forecast losses for the following year. Past experience includes not only losses paid, but losses that will be paid in the future because of injuries that occurred in the experience period. Premium rate is then calculated by assuming that losses as forecast above will occur in the coming year, and then making the premium sufficient to pay these losses and the expenses related to them. Rates are revised annually. No attempt is made to recapture underwriting losses or repay underwriting gains, for by making

annual revisions it is believed that premiums will be kept responsive to losses. See *Heitzmann, supra* at p. 199.

Thus, the premium paid by Appellant Robertson to Appellant Liberty Mutual in 1951 was calculated to pay losses that occurred because of injuries that occurred in that year, and as a retroactive change in benefits could not be contemplated, nothing was put into the premium calculation for the loss which Michigan tribunals have directed the Appellants must pay.

The unfair result that retroactive legislation can have on this type of rate making structure is apparent. In 1959, the Michigan Supreme Court concluded that the 1955 substantive amendment was retroactive, and that for all injuries that had occurred prior to the amendment the employees were entitled to unlimited medical benefits. The method of calculating rates, approved by the Insurance Commissioner in accordance to the statutes as being reasonable, could not take the losses, made losses for the first time by the decision in *Lahti v. Fosterling, supra,* into account in calculating premium, but insurers are obliged to pay them nonetheless.

The end result is that the state, by the exercise of the police power, regulates the premium rate to be charged and determines it to be reasonable for the risk taken and then subsequently, after reasonable premiums are collected, determines that the risk is larger than was allowed to be considered when the premium was approved. We contend that retroactively adding to the risk, once reasonable premium for a lesser risk is determined, cannot be condoned merely by saying that the retroactive legislation was a reasonable exercise of the police power, for if the premium was determined reasonable for 1951 injuries in 1951, adding substantially to the 1951 risk in 1955 or

1959 necessarily makes paying claims on risks not contemplated in 1951, unfair and unreasonable. At the very least, such a set of circumstances raises substantial constitutional questions.

The *Nebbia* and *Williams* cases certainly allow for the reasonable regulation of premium rates for workmen's compensation liability insurance. It is quite another thing to have regulation of premium rates and the determination of a fair rate, and then after the rate is determined and paid, have the state enlarge the risk upon which premium rate was calculated.

There is no indication in this record that the burden of charges for the confinement of Larry Newberry are now on the shoulders of the guardian of Larry Newberry. The records of Wayne County, Michigan, Probate Court, Case Number 528-096 shows that Larry Newberry is confined and expenses of confinement are charged to the public.

Considering the circumstances revealed in the record, confinement after attempting to attack his father and police officers with a butcher knife, the possibility of any of Larry Newberry's family ever being held liable for the cost of confinement is remote. See *Department of Mental Hygiene v. Kirchner,* 388 P2d 720, 380 US 194, 400 P2d 321.

The foregoing demonstrates that the basis for use of the pious sounding phrase "more equitable distribution of the economic burden" here—a windfall for the insurance company, and large expenses placed on the brother of Larry Newberry—is absent.

## CONCLUSION

Michigan workmen's compensation rights and obligations are based upon the contract of employment and, thus, are subject to the constitutional protections afforded by Article I, Section 10 of the Constitution of the United States.

While the protections given by Article I, Section 10 are not absolute, cases which have allowed impairment of contract have done so only if vital interests of the people made it necessary, and then allowed limited and temporary changes.

Examination of the factors in this case show that there is no analogy between the interests determined vital in the cases allowing limited and temporary impairment, as the amendment here was the forty-ninth in a period of thirty-three years, and none of the predecessors, although some were broader in scope, were found necessary to impair contract rights.

The impairment here cannot be classified as limited or temporary. The change made the new rights and new obligations for medical benefits unlimited, both as to amount and to persons who would be entitled to benefits, and permanent.

There are substantial questions for the review of this Court when the limits to the police power regarding impairment of contract, —limited, temporary impairment to protect the vital interest of the people—have been ignored.

Retroactive legislation, by its nature raises questions of fairness. The use of the phrases "more equitable distrubution of the economic burden", "the private right must yield to the public need", "the humanitarian purposes of

workmen's compensation" and "exercise of the police power" does nothing in defining limits to the state's police power, although in constitutional government there must be limits.

When what an insurer of workmen's compensation liability can charge for the protections afforded is subject to police power regulation, and after application of these regulations has produced a rate that was determined by the state to be fair, retroactively adding to the risk by inclusion of an unlimited right to medical benefits raises substantial questions of fairness.

Cases applying the concept of due process of law to legislation which regulates the use of property do not determine cases where the use of property was first regulated and then was taken.

When legislative changes are substantive, and there can be no question that here they are substantive, and a Court accepts a definition of "remedial," so broad as to include both substance and procedure, and then applies a rule applicable only to procedure, and in doing this avoids consideration of due process of law limitations, substantial issues of constitutional law are raised.

Wherefore, Appellants pray that Appellee's Motion to Dismiss or Affirm be denied, and that probable jurisdiction be noted, the case be accepted for oral argument and the decision below reversed.

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